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ON THE UNIFICATION OF PRIVATE LAW

Allocution of His Holiness Pope Pius XII*

IN these Our greetings, Gentlemen, and in the expression of Our pleasure at receiving you, you should not merely see the normal, sincere manifestation of Our benevolence. You have a very special title to Our welcome as outstanding representatives of the science and the practice of law.

Even with only some little knowledge of the history of civilization; even with only some little reflection on the nature of law and its role and function in the life of human society—: who can be surprised that the Church has never ceased to be interested in the law?

Plato, in a formula which in its forceful precision bears the stamp of his genius, has given form to the thought latent in the mind of all antiquity, in the following terms: *ὁ δὴ θεὸς ἡμῖν πάντων χρημάτων μέτρον ἂν εἴη μάλιστα, καὶ πολὺ μᾶλλον ἢ πού τις, ὥ φασιν, ἄνθρωπος* (*Leg.* IV, 716C): "God is for us above all the right measure of all things, much more than any man could ever be." The Church, too, teaches

* On July 15, 1950, the Holy Father received and addressed in a special audience two hundred legal scholars, from thirty countries, together with delegates of the UN, UNESCO, Pax Romana, the Council of Europe, and other organizations, all of whom had attended the First International Congress of Private Law, held in Rome under the auspices of the International Institute for the Unification of Private Law. The Holy Father's discourse is here translated from the original French text published in the *Osservatore Romano* of July 17-18, 1950.

this very same idea—but in all the fulness and depth of its truth—when she states with St. Paul that all fatherhood derives from God, πᾶσα πατριὰ ἐν οὐρανοῖς καὶ ἐπὶ γῆς (*Eph.* 3:15), and thus affirms, consequently, that in order to regulate the mutual relations existing within the great human family, all law is rooted in God.

This is why the Church, while she rejects the extremist legal positivism which ascribes to the law its own and (as it were) autonomous " sanctity ", actually crowns the law with a higher and true sanctity; a sanctity which enjoins, in the last analysis, obedience to the law upon every Catholic, and also upon every other man who believes in the existence and the sovereignty of a personal God.

As to the Church herself, since she is a great social organism, and a firmly constituted supra-national community, how could she exist without a definite and precise law? Apart from this consideration, which, logically incontrovertible, still pertains to the purely natural order, she is conscious of having been established by her divine Founder as a visible society, endowed with a juridical order: the basis of this order, this juridical charter, is therefore nothing else but the divine positive law. To be sure, the end of the entire life of the Church, her function of leading all men to God, and of furthering their union with God, belongs to a sphere beyond this world, the supernatural: it is, ultimately, something that takes place immediately and personally between God and the individual. But along the road on which this function is exercised and which leads to this end all the faithful travel as members of the ecclesiastical community, under the guidance of the Church, through the particular, concrete conditions of existence. And he who speaks

of "community" and "guidance by an authority," speaks implicitly of "power of the Law and of laws."

There is no need in speaking to you, Gentlemen, who know Canon Law well enough, to instruct you further on the value of these intimate connections.

But now, to come to your Institute, We wish to give testimony of the great esteem in which We hold its mission and its work. A glimpse at the objective and the history of International Private Law suffices to make one realize how difficult is the coordination of different legal systems. For the field of your endeavors even exceeds, in its extension and its depth, that of International Private Law (Conflict of Laws). It has no less a goal than to prepare, step by step, uniform legislation in the field of private law. This is an undertaking of great courage, yet timely and urgent.

Would preceding generations ever have considered possible, or could they even have dreamt of, the technical progress of intercommunication which in so little time has shortened the distances between all men, to the point where the familiar expression, "The world has become so very small," is literally true? It will continue to become smaller and smaller.

Besides, the pan-European idea, the Council of Europe, and other movements too, are all manifestations of a necessity felt by all: the necessity to break, or at least to soften, politically and economically, the rigidity of the old framework of geographic boundaries; to form among countries large groups of common life and common action. One may like it or not, but there is no point in disregarding all these practical considerations. As an inescapable consequence of the war and under the pressure of events, the overpopulation of certain regions and the resulting unemployment are entailing, through

emigration and immigration, large demographic shifts, which, in the course of the next half century, will probably by far surpass in their importance the emigration to the Americas of the last one hundred and fifty years. How greatly useful will then be the coordination of private law!

Will it, however, always be possible to extend such coordination to the entire field of private law, even for a limited group of nations? Will a radical equalization be everywhere truly of advantage? It would be difficult to say so here and now. In fact, it may be possible that, after all, economic and social conditions, or the general culture, remain so widely different in given countries that a uniformity embracing all nations and all private law would not correspond entirely to the requirements of the common good.

Be this as it may, We beseech you to have always present in your mind the following three points:

First, the untiring, most attentive, and most effective protection of all who are in greater need of it, especially of homeless children and lone women: it is particularly with regard to these that the legislator ought to shape his action on the model of the father and mother of a family.

Secondly, the simplification of the legal rules concerning the status of those who by their occupation are obliged to pass frequently, or even periodically, from one country to another.

Finally, the recognition and realization, both direct and indirect, of the inborn rights of man, which, since they are inherent in human nature, are always in conformity with the common weal. Or rather, they are the rights that must be considered essential elements of the common good: it follows therefrom that the State has the

duty to protect and to promote them, and that under no circumstances may they be sacrificed to a pretended *raison d'état.*

With the most vivid and most sympathetic attention We follow, Gentlemen, your work and the development of your Institute. With all Our heart we call down on it, on yourselves, and on your families, the Divine assistance and the blessing of God.

PAPAL ALLOCUTION TO ITALIAN JURISTS

This allocution was delivered on November 6, 1949. In it the Pope praised the nobility of the legal profession by describing it in the terms of Ulpian who defined jurisprudence as the knowledge of what is divine and human, the science of what is just and unjust. The knowledge of the divine is thus made prerequisite to a proper knowledge of what is human and, consequently, to an adequate understanding of law, since, in the words of Cicero, the nature of law must be sought from the nature of man. Thus, concluded the Pope, what is divine and what is human are so intimately connected that one cannot be ignorant of the first without losing an exact evaluation of the second. Indeed, the knowledge of what is just and what is unjust demands a knowledge of the order in creation and consequently of the Creator, since justice is something that inheres in man, in society, and in the fundamental institutions of the latter as the cause of the practical principles which it provides and imposes and of those universal norms of conduct which are a part of the objective human and civil order, determined by the mind of God (Cf. *Acta Apostolicae Sedis,* XLI, 597).

A TYPICAL DEVELOPMENT IN THE ROMAN LAW OF SALES*

THE aim of the following remarks is not to present new solutions for special problems in the history of Roman law. Most of the facts I shall mention are well known to the learned world, especially through the inquiries of my eminent colleague Ernst Rabel of Ann Arbor, former professor of Roman Law at the University of Berlin,[1] and of the late Giovanni Rotondi, to whose studies the science of Roman Law owes so much.[2] There are only some new facts, especially with regard to the *clausula doli,* on the significance of which for the Roman law of sales I shall put forward a new theory.[3] The purpose of the present paper is rather to trace a typical development within the history of the Roman and the civil law, and to demonstrate, by a typical example, how, in the long history of the civil law, an institution was shaped which is a highly characteristic feature of the Roman-influenced legal systems: the different "types of contracts," such as the contract of sale, of loan, of partnership, etc. In all the civil law systems we find a great number of rules which apply to the contractual relations between the parties: they are destined to supplement the agreements among the parties themselves, which are seldom complete. These rules, which

* This paper was presented in the session of December 16, 1949, of the Riccobono Seminar of Roman Law in America at Washington. The author, who at the time was a Visiting Professor at the Law School of the University of Chicago, uses this opportunity to express his gratitude to the Seminar for the kind invitation.

[1] Rabel, *Die Haftung des Verkäufers wegen Mangels im Rechte* (Leipzig, 1902).

[2] See especially his article, "Natura contractus," *Bullettino dell'Istituto di Diritto Romano,* 24 (1911), 5-115, also *Scritti Giuridici* (Milan, 1922), II, 159-267.

[3] It will be argued more closely in a study to be published in the forthcoming *Festgabe für Fritz Schulz.*

largely correspond to the rules of the American Uniform Sales Act, are formed for certain typical transactions, which often arise in economic life.

In every legal system, technical rules as well as technical concepts are the product of history. There may be, and I believe there are, some basic moral rules in which the foundation of all law is to be found; but when we look at the technical formulations, we enter the realm of history.

The civil law—notwithstanding its codification—is no exception to this rule. In the civil law, too, technical rules are the product of a long history and this is true likewise for the technical rules which make the content of the Roman law of sales. The purpose of this paper is to demonstrate how, first, the practitioners of the Roman Republic drew up a series of practical provisos; how, later on, the great imperial jurists of the classical age unified these special provisos by the *actio empti,* i.e., by means of procedure; and how, finally, in the law schools of Byzantium and of medieval Italy, the professors worked out a theory which rationalized the traditional status of the law. Legal history, it is my conviction, must be the basis for every advanced study in the field of comparative law. The following pages, therefore, may be considered a modest contribution towards an historical introduction to the civil law.

I.

To the ancient Roman law, as far as we know it, a contract to sell, in the modern sense, was unknown. What we find is the *mancipatio,* a highly formalized act which was used to convey land and movable things, and the formalism of which seems to show that once it had been an actual exchange of price and goods.[4] It is probable that, besides the *mancipatio,* an informal and actual exchange of goods existed in the economic practice of this ancient time; but, legally, no obliga-

[4] For the significance of the individual acts in the *mancipatio* see f. ex. Kaser, *Eigentum und Besitz im älteren römischen Recht* (Weimar, 1943), § 16.

tions arose out of such an exchange.[5] The *mancipatio,* as is well known, did create such obligations: especially, the vendor was bound to assist the vendee in case of eviction; he had to enter the proceedings as defendant, and in case he failed to fulfill this obligation, or if he did not succeed in his defense, he had to pay to the vendee the double amount of the price. This was—briefly stated—the content of the *actio auctoritatis.*

This framework was completed by devising such stipulations as were needed to determine more closely the obligations of the parties, especially those of the vendor. These stipulations were created by the Roman jurists who gave their advice to the public; they were not the work of the legislator. They were meant, in part, to complete the rules of *mancipatio;* but in part they were destined also to create obligations and warranties in favor of the vendee in case of the informal sale which later on became the *emptio venditio.* Thus, we find the *stipulatio doli* connected with the *mancipatio* as well as with the *emptio venditio,*[6] whereas the *stipulatio duplae* transferred—in a certain sense—the law of the *mancipatio* to the informal contract of sale and, consequently, was developed in all probability at first for the latter.[7] As for the time in which these provisos originated, we can only assume that they were created between the fourth and second centuries B.C., but there exists no exact information.[8] They all had the form of *stipulatio,*[9] so as to make them actionable.

[5] For this question see Kaser, *Das altrömische Jus* (Göttingen, 1949), p. 312, and Arangio-Ruiz, in *Festschrift Paul Koschaker* (Weimar, 1939), II, 160. Arangio-Ruiz insists that legal protection was granted to informal sales in the commerce with foreigners first; this would not exclude, of course, that such agreements did occur, even before, between Roman citizens.

[6] See D.19.4.1 pr.

[7] See Jörs-Kunkel, *Römisches Recht* (3rd ed., Berlin, 1949), p. 231. For the later development compare the "emptio pueri" of 142 A.D., printed f. ex. in Arangio-Ruiz, *Fontes Iuris romani antejustiniani,* III (Florence, 1943), no. 88.

[8] The *stipulatio doli* must have been developed before the *actio de dolo* was created; Varro, mentioning the warranties for quality by *stipulationes,* speaks of *antiquae formulae:* Varro, *Libri rerum rusticarum,* II.2.5.

[9] Formal contract by word of mouth which gave rise to an action under the *ius civile.* See Gaius, *Institutiones,* III.92.

1. The first of these clauses was the *stipulatio habere licere.* The text of this proviso was: (The vendee asked:) "mihi habere licere spondes?"[10] or "per te non fieri quominus mihi rem habere liceat spondes?"[11] It meant that neither the vendor nor one of his heirs should ever claim the goods sold or disturb the vendee in his possession. The seller assured the buyer that he would refrain from any act, be it in law or in fact, which could deprive the vendee of the possession. As Ulpian states it (D.45.1.38. pr.): "that neither by the vendor nor by his heir nor by any one else would anything be done so that the buyer may not have."[12]

The wording of the formula shows that it was created long before legal science had defined the concepts of *proprietas* or *dominium.*[13] No technical terms are used: the vendor simply assures the buyer that he will allow him to have the goods for himself, and, by this promise, gives him a security which modern legal thinking would connect with, and deduce from, the fact that the buyer had become the owner of the goods.[14]

2. The *stipulatio habere licere* protected the buyer against any attempt on the part of the seller or one of his heirs to recover the goods sold. But what would happen if a third person which was not a party to the contract would claim the goods? This is the question of the so-called warranty of title. Again, this eventuality was provided for by a special stipulation, the *stipulatio duplae.*

The wording of this *stipulatio* may be illustrated by a deed found in Roumania and dating from the time of the Emperor

[10] D.45.1.38 pr.

[11] Compare D.45.1.4.1 and *h.t.* 38 pr.; see Kaser, "Das Ziel der actio empti nach Eviktion," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Rom. Abt.* (=SZ), 54 (1934), 176.

[12] I follow the text as established by Beseler, SZ, 43 (1922), 554, and Kaser, SZ, 54, 176-77.

[13] For the development of these concepts see Kaser, *Eigentum und Besitz,* § 37.

[14] For the observation that promises of warranty functionally replace the property, see Rabel, *Haftung des Verkäufers,* p. 60.

Antoninus Pius.[15] The deed attests that a certain Maximus Bato has bought and accepted by *mancipatio* a slave girl from Dasius Verzo Pirusta. The *stipulatio duplae* goes on: [16]

> Si quis eam puellam partemve quam ex ea quis evicerit quo minus Maximum Batonis . . . habere possidereque recte liceat, tunc quanti ea puella empta est, tantam pecuniam et alterum tantum dari fide rogavit Maximus Batonis, fide promisit Dasius Verzonis Pirusta.

As appears from the text, the *stipulatio duplae* has been formed on the model of the *actio auctoritatis* and assures the buyer of a similar protection.

Later on, the Roman lawyers seem to have found such a warranty even in the *stipulatio habere licere.* We have seen above that by this *stipulatio* the seller promised the vendee undisturbed possession. Now, if the stipulation was not expressly limited to acts by the seller and his heirs, one could construe it in the sense of a promise to the effect that *nobody* should disturb the buyer in the possession of the goods. According to such a construction, the case of eviction by a third person, too, seemed to be covered by the *stipulatio habere licere.* But this construction of the proviso seems to have remained doubtful with the Roman lawyers, and the normal case seems to have been that a special *stipulatio duplae* was inserted in the contract. Ulpian tells us (D.45.1.38 pr.) that the said construction of the *stipulatio habere licere* would equal a promise of acts to be done by third persons (namely, to refrain from disturbing the buyer) and such a promise would be void.

But wherever the legal reason for the warranty was to be found, it was a matter of fact that such warranty covered only the eventuality of an eviction. In contrast to the rules of the

[15] See Arangio-Ruiz, *Fontes,* III, 281.

[16] If somebody would evict the slave or a part thereof (for this proviso, compare D.21.2.56.2), so that Maximus Bato "might not have and possess the slave, then Dasius Verzonis promises to pay the amount paid for the slave, and once more the same amount."

Uniform Sales Act, for example (section 13 (1), 69), the buyer was not entitled to recover the *duplum* or damages if it appeared that he did not become the owner of the goods only because the seller had no right to sell them. It was only after eviction had taken place, and after the buyer really had lost the undisturbed possession of the goods that he could claim damages. It is true that, later on, this rule was somewhat restricted by the classics. They stated, e.g., that the action based on the *stipulatio duplae* would lie in the following case: The buyer, before having been sued by the owner, had seen and examined the latter's title and, acknowledging his right, had bought the goods anew from him. He then could recover the *duplum* from the seller.[17]

But these were only single exceptions. The established rule was and remained that damages for breach of warranty could be claimed only upon eviction, if the buyer had lost the possession of the goods. This is the so-called principle of "warranty for eviction."

Curious enough, this principle was adopted even by the modern European codes, although they compel the vendor to transfer the property of the goods to the vendee. One should assume that a statute which compels the seller to transfer property would provide for a warranty for any case in which the property has not been transferred on the vendee. But in modern European Law the Roman principle of warranty for eviction subsists. Art. 1626 of the French *Code Civil* states:

> Although there be no stipulation at the time of the sale as to warranty, the vendor is obliged by law to warrant the purchaser against being ejected from the . . . thing sold . . .

And the German Code (§ 440 II):

> If a movable thing has been sold and the possession thereof has been transferred to the vendee, the latter can claim damages on account of the fact that a third person has a right

[17] D.21.2.28 pr. See Rabel, *op. cit.*, pp. 77ff.

to the possession of the thing *only if he has given back the thing to the third person with regard to his right . . .*

The Swiss Code, too, upholds the Roman principle. We may assume that the reason for this attitude is not only legal conservatism. The Roman rule, though ancient and primitive, is well founded even under modern law because, as long as there has been no eviction, the buyer retains the possession of the goods and so far seems not to be entitled to damages.

3. The next clause known to us in the Roman contract of sales is the so-called *clausula doli*.[18] The wording of this stipulation is as follows: (The seller says:) "Malicious fraud is far from me [from my mind]" (*Dolus malus abest*). The meaning is that there is no actual deceit on the part of the seller at the moment the purchase takes place. It means, for example, that the seller of an estate did not conceal easements established on the estate in favor of a third person; or that he really is—as he pretends to be—the proprietor of the land; that there are no concealed defects in the goods, etc. To a modern lawyer, such promise may look strange; it seems self-evident for us that every kind of fraud or deceit can be countered by some legal remedy, and an express promise to refrain from fraudulent acts looks somewhat childish to us. But one must remember that the stipulations under consideration were worked out in a period when formalism guided legal reasoning. The courts looked on the word of the formal contract; only what was formally stated was considered as relevant. On the other hand, if there was a promise given in due form, it was held immaterial whether or not such promise had been elicited by some fraudulent act or other undue influence on the part of the promisee.

With respect to the performance, too, contracts were understood literally. If, e.g., the plaintiff had bought an estate which was an orchard when he had first seen it but which at the time of transfer appeared to be completely devastated by

[18] See Arangio-Ruiz, *Responsabilità contrattuale in diritto romano* (2nd ed., Naples, 1933), p. 178.

the vendor so that no fruit tree could be found, the plaintiff would be compelled to accept the estate as it was and to pay the price, unless he had inserted a special clause with regard to the orchard. For, it was argued, the vendor under the contract had to transfer the estate, and so he did. But if there was a *clausula doli* in the contract, the vendor would be held liable for having cut down the fruit trees, because he had promised to refrain from any malicious and fraudulent act.[19] Besides, even then, the ancient Roman lawyers looked at the very wording of the stipulation. A quotation in the Digest from the writings of Proculus (D.18.1.68) tells us that there were different versions of the *stipulatio doli,* which had a different significance. If the seller had used the present tense and said, "malice and fraud are far from me," only fraud or malice present at the very moment of the agreement made him liable; but if he had used both present tense and future, malicious acts subsequent to the agreement would be covered as well. These narrow constructions of the *clausula doli* subsisted to the age of Augustus; for at that time Labeo made this distinction in the above-mentioned case (D.4.3.7.3). Only later were the classics able to construe such stipulations in a broader sense.

The fact that the *clausula doli* was a part of the old scheme of the Roman contract of sales shows that the legal concept of good faith (*bona fides*), which was so important in the later development of the Roman law of sales, had no general significance when the pattern of this contract was first worked out. Otherwise a special clause, forbidding malicious and fraudulent acts, would not have been necessary. On the contrary, the *stipulatio doli* must have been very usual. It became traditional. We find this stipulation as late as the fifth century A.D. in an African contract concerning a sale of land.[20]

[19] For this case cf. D.4.3.7.3.

[20] See Arangio-Ruiz, *Fontes,* III, no. 139.

We find traces of this stipulation even in modern European Law. The French Code states (Art. 1645) with respect to concealed defects: "If the vendor knew the defects, he is not only bound to return the price but is also liable for any damages, with interest, which the purchaser has suffered"; and the German Code (§ 463) has a similar rule. These provisions are nothing but the last traces of the *stipulatio doli.* The cases which these rules have in view are special cases of fraudulent acts.

4. Other stipulations dealt with warranty for quality. We know from the cases cited by Ulpian, in his commentary on the law of sales in the praetorian Edict, that it was common use for the seller to give warranty for certain qualities of the goods. If, e.g., slaves were sold, it was usual warranty that the slave was not what the Romans called an *erro,* i.e., a slave who tried to escape and consequently needed special control; if cattle was sold, warranty was given that the cattle was healthy. Such stipulations differed of course from each other according to the nature of the object. If land was sold, a certain size often was warranted,[21] or the absence of easements.[22]

These stipulations gave the buyer an action, if the slave or the cattle lacked the warranted qualities. When the parties had not agreed on such specific stipulations, the vendor was only liable in case of actual deceit, and even this originally not on the basis of a general rule but only as a consequence of the *clausula doli,* provided such a *clausula* was inserted in the agreement of the parties.

5. These clauses were sufficient to guarantee the position of the buyer as long as price and goods were actually exchanged, as was the case in the original *mancipatio* and, probably, in the older form of the *emptio venditio,* as long as this contract remained an actual exchange of money and goods. But at the moment the parties only made an agreement for *future* de-

[21] See D.18.1.40.2.

[22] This was expressed by the formula, *ita ut optimus maximusque,* D.21.2.75.

livery and payment—a contract to sell in the modern sense—it became necessary to meet the new contingencies by new provisos. Of course the *mancipatio* could not be transformed in this way; but an agreement on future performance was possible in the case of the informal *emptio venditio*. This is probably the connection in which we have to place the stipulation by which the vendor bound himself to *vacuam possessionem tradere* (to transfer the unrestrained possession [of the goods]). This stipulation is mentioned in the Digest (D.19.1.3.1). The term *vacua possessio* is meant to exclude for example the case that the praetor has ordered a *missio in bona* in favor of a third person.[23] It is surprising to see that by this stipulation the vendor promises only to transfer the *possessio,* whereas we know from later sources that the vendor was also bound to perform the *mancipatio* in all cases where this was possible and necessary, i.e., in the case of a *res mancipi.*[24] Arangio-Ruiz has connected this fact with his theory that the *emptio venditio* received its legal form and protection first in the relations between Romans and foreigners: since *mancipatio* could not be performed by foreigners, people were content with the stipulation of *vacua possessio;* and when later on *emptio venditio* was used between Roman citizens as well, a new *clausula* was inserted, binding the vendor to perform the *mancipatio.*[25] It is not possible here to discuss this theory; suffice it to state that the system of stipulations which the ancient Roman jurists created for the *emptio venditio* included provisos for the future delivery of the goods.

The simple exchange of price and goods, which is expressed by the term *emptio venditio,* and which probably was an informal copy of the *mancipatio,*[26] thus was surrounded by the Roman jurists with a framework of stipulations which defined more closely the legal position of the parties and

[23] See D.19.1.2.1 (Paulus).

[24] See Paul., *Sent.,* I.13a.4; Gaius, *Inst.,* IV.131a.

[25] See *Festschrift P. Koschaker,* II, 159-60.

[26] See Arangio-Ruiz, *loc. cit.*

which, at the same time, laid the foundations for the substantive rules actually governing the contract of sale in the civil law. But we have to retain that, originally, these rules were only binding if the parties had made the necessary stipulations: without such formal agreement, there was no legal protection.[27]

II.

It was probably only after these stipulations had been devised that legal protection was given to the *emptio venditio* as such, by the creation of the *actio empti* and the *actio venditi.* On the origin of these actions we do not find any direct evidence in our sources. But I should suppose that the creation of the stipulations preceded the creation of the *actio empti.* In our sources we can clearly distinguish two layers of the law of sales: a framework of stipulations, and the rules which govern the application of the *actio empti.* Both systems, it is true, are connected in the writings of the classics; but it appears from the sources that this connection was made *ex post facto* [28] and we can hardly assume that the stipulations would have been created, had the informal contract of sales already enjoyed the protection by an *actio ex fide bona.* It seems much more likely to assume that the stipulations belong to an older period and that, later on, they provided the standard for the *actio empti.*

But then the problem arises: what, originally, was the content of the *actio empti?* The formula gives no answer. It says, " quidquid ob eam rem . . . dare facere oportet " [29] and does not mention concrete obligations. But from the writings of the classics we learn that with the *actio empti* the vendee could sue for " id quod interest rem habere "; [30] which means that the buyer was protected if the vendor did not transfer

[27] See Celsus, D.18.1.59 with respect to an *emptio fundi.*

[28] See f. ex. D.18.1.68.1.

[29] See Gai. IV.131a.

[30] See D.19.1.1 pr. (Ulpian) and *h.t.* 11.2.

the possession (*rem tradere*) or, as the case may be, perform the *mancipatio*. It is very likely that the *actio empti* originally was restricted to this eventuality.

But its field of application was enlarged step by step during the time of the classics. It is understandable that the judge who was directed to conform his judgment to the formula, "quidquid ob eam rem . . . dare facere oportet," or his legal advisers were looking for a standard which could determine more closely what was due in an *emptio venditio*, and that they found this standard in the framework of the already existing stipulations which, apparently, had become traditional. In any case, this is what we can observe in the writings of the classics. We have evidence, at least for the *stipulatio duplae*, the *stipulatio vacuam possessionem tradere*, and the *clausula doli*, which shows that the *actio empti* was extended to them, i.e., that the buyer could bring this action in any case of eviction or fraud—even if there was no special stipulation—and ask for all he would have had, had he enjoyed the protection of the said stipulations. The first stage of this development seems to have been that the buyer (by the *actio empti*) could compel the vendor to agree to these stipulations although nothing was said about them in the contract itself.[31]

The next step was that by the *actio empti* the buyer could ask that the case be regarded as if a *stipulatio duplae*, etc., had been agreed upon; or, to put it differently, he could claim the same amount he would have been able to claim under a *stipulatio duplae*, etc. This appears clearly, for example, from the following text: "Si res simpliciter traditae evincantur, tanto venditor emptori condemnandus est, quanto si stipulatione pro evictione cavisset." [32] Some of the classical jurists, finally, held the view that the buyer, in case of eviction, could simply claim damages.[33]

[31] See D.19.1.11.8 (Neratius).

[32] Paul., *Sent.*, II.17.2.

[33] See D.21.2.8.

For the *clausula doli,* this development seems to have taken place even earlier, perhaps as early as the time of Augustus or the late Republic, and the *clausula vacuam possessionem tradere* was fused with the obligation of *rem tradere* under the *emptio venditio.* Thus, by extending the field of application of the *actio empti,* the classical jurists unified the law of sales; they connected a number of the old stipulations with the informal *emptio venditio.* The rules laid down in the stipulations, originally only relevant when expressly and formally recognized by the parties, became the general rule for all cases of *emptio venditio.* This was done by interpretation of the formula and without intervention of the legislator.

However, this process of unification was not completed in the classical epoch. The classics did not include in the *actio empti* the warranties for quality, unless there was a special *dictum* of the vendor.[34] The reason seems to be the following: (1) since the warranty for quality had of necessity to be different for the different types of goods—for example, cattle or slaves—no single formula could exist, as it existed in the other cases; (2) the curulian aediles had—at least for some important transactions—set up specific provisions which compelled the vendor to agree upon stipulations of warranty under the sanction of two special actions, the *actio redhibitoria* and the *actio quanti minoris.* Consequently, there was no room for an extension of the *actio empti.* It was only Justinian who connected the regulation of the aediles with the law of sales; but since in his time the system of actions had become obsolete, he did so not by means of extending the *actio empti.* All this is well known; for our purpose it is only important to stress the fact that the edict of the curulian aediles itself was constructed on the model of the ancient stipulations. Here too, the law followed the line drawn up by the traditional agreements.

[34] For such a *dictum,* actionable by the *actio empti,* see D.19.1.38 and 64.

III.

The process we have followed until now was a *process of creation:* we have seen the jurists work out practical rules for the decision of cases, and connect the individual rules by interpreting the formula of an action. This process lasted for centuries from the time of the middle Republic until the end of the principate. What followed, and what we have to consider now, is a *process of rationalization.* A logical theory was worked out in order to explain and systematize the existing rules. This was not the work of practioners but of professors. It was done in the law schools of Byzantium and Bologna, largely for reasons of teaching, and without changing the established substantive rules. What the professors had to explain was the problematic fact that, under the law of sales which they had inherited from the classical age, the relations between vendor and vendee were governed by rules on which the parties had not expressly agreed, for example, warranty for evictions, liability for fraud, etc. It is the problem which the modern American law has solved by the concept of "implied warranties." This problem was all the more difficult because the Byzantine jurists looked at the law no longer as a system of actions, but regarded it as a body of substantive rules. Now, one of the principles which guided the Byzantine jurists was that in contractual relations the agreements of the parties and their intention should prevail. "Quid enim tam congruum fidei humanae quam ea quae inter eos placuerunt servare?" [35] The question was how to unite this principle with the fact that the vendor was held liable for eviction without having agreed on a proviso fixing such liability. The Byzantine jurists solved this problem by the theory of *natura contractus,* which they had developed probably under the influence of Greek logic and philosophy.

The classical jurists had known the concept of "nature of things" (*natura rerum*). They had spoken of things which

[35] D.2.14.1 pr.; cf. Pringsheim, SZ, 42 (1921), 652.

nature does not allow to exist, such as the *hippocentaurus,*[36] of acts which could not be done because the laws of nature made them impossible,[37] of obligations and rights which could or could not, by their nature, be divided (D.45.1.2.1). But speaking of "nature," they always had in mind something factual, the natural qualities of things or the laws of nature as revealed by science and experience.[38] The Byzantine jurists, on the contrary, spoke of *natura* (φύσις, λόγος) in the philosophical sense of "essence" or "substance" and transferred this concept to legal institutions. They spoke not only of the natural qualities of things, but also of the *natura* of the contract of sale, etc. For them, the nature of a legal institution was determined by the positive rules which governed it; it was the essential content of these rules.[39] Thus, the liability of the vendor for eviction or fraud belonged to the "nature" of *emptio venditio.*

As to our specific problem, the Byzantine jurists taught that all that follows from the nature of a certain type of contract should be binding for the parties, even though they had not expressly agreed on such rules. Thus, Stephanus, a jurist of the time of Justinian, says: "What follows from the nature of a contract, does not need a specific agreement,"[40] and "It is superfluous to lay down expressly what follows from the nature of the contract."[41] If seller and buyer had agreed on the goods to be sold and the price to be paid, it was clear that the contract was an *emptio venditio:* that the vendor, then, was liable for eviction, followed from the "nature" of the contract. Thus, the interpolated text of D.19.1.11.1 says:

[36] See Gaius, *Inst.,* III.97a.

[37] D.46.1.35 pr.

[38] See Rotondi's brilliant article, "Natura rerum" (note 2, *supra*), esp. *Scritti,* II, 203f., 207. He was, however, too conservative in his interpretation of the texts. See further Levy, "Natural Law in Roman Thought," *Studia et Docum. Hist. et Iuris,* 15 (1949), available to me only in reprint; esp. p. 6ff.

[39] For all this see Rotondi, *passim,* esp. p. 186.

[40] Scholion 1 to D.2.14.43 (Heimbach, *Basilica,* 1.629).

[41] Scholion 1 to D.12.1.3 (Heimbach, *Basilica,* 2.590).

> Et in primis sciendum est in hoc iudicio id demum deduci, quod praestari convenit . . . quod si nihil convenit, tunc ea praestabuntur quae naturaliter insunt huius iudicii potestate.

The concept of *natura contractus* solved our problem: it united all the single substantive rules of the law of sales and made it one "type of contract." There was reason for one of the Byzantine jurists to exclaim: "O, how powerful is the nature of contracts!" [42]

In the Middle Ages, after the revival of the *Corpus Iuris* in the West, this theory was transformed by the Italian glossators and commentators. They, too, applied philosophical terms to legal problems. Aristotle, in his *Topics,* had distinguished the *essentiale,* the *proprium* (or *naturale*) and the *accidens. Essentiale* is what determines the essence or substance of a subject; *proprium* or *naturale* is what—without determining its essence—can be said of this subject only and thus is characteristic and equivalent of it; *accidens* is what may or may not be found in a subject and thus is not necessarily connected with it.[43] This distinction was applied to legal institutions. Thus Baldus tells us in his famous commentaries on the Digest: [44]

> Illa glossa appellantur substantialia sine quibus contractus esse non potest. Illa appellantur naturalia quae contractu inferuntur. Illud appellatur accidens quod devenit ex sola ordinatione partium nec ullo modo intelligeretur per dispositionem legalem.

According to this theory, the parties to a contract had to agree expressly only on such terms as were considered essential for this type of contract: for example, in a contract of sales, on the price and the goods; [45] if they had done so, the

[42] See Heimbach, *Basilica,* 2.601.

[43] See Aristotle, *Topics,* 1.5.102a.

[44] Nota 1 to D.2.14.7.7. The text of the edition of Lyons, 1562, has been followed.

[45] Baldus, *loc. cit.*

contract existed with all its natural qualities and with all that was considered a "natural" part of the agreement. Such a *naturale* was—in the contract of sale—the liability for eviction.[46] It was given at the moment the parties made a contract of sale.

Thus, by means of philosophical terms and concepts, the theory solved the problem on hand and gave a rational basis to the unity of the law of sales. It was by this theory that the "types of contracts" or "standard contracts" were created which united all the rules concerning the relations between vendor and vendee. The theory was retained, in the form the glossators had given it, through all the following centuries, and even today it is part and parcel of the legal thought of the civil law countries.[47]

We have assisted here a legal development of more than two thousand years. The Roman jurists, the unknown practitioners of the Republic as well as the classics, created a framework of substantive rules; the law schools of Byzantium and medieval Italy rationalized it and brought it into a logical form. This development, I believe, is highly typical for the history of the civil law.

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[46] *Ibid.*

[47] For the *Gemeine Recht*, the Roman Law in Germany of the nineteenth century, see Sintenis, *Das practische gemeine Civilrecht* (3rd ed., Leipzig, 1868-9), I, 163, and Dernburg, *Pandekten* (5th ed., Berlin, 1896-7), I, 222 (§ 93). For modern German Law, see Enneccerus-Nipperdey, *Allgemeiner Teil* (Lehrbuch des Bürgerlichen Rechts, I; 13th ed., Marburg, 1931), § 176 III.

THE BASIS OF PENAL JUSTICE*

I.

THE principle of equality in returning evil for evil (*Wiedervergeltungsrecht, ius talionis*) has been maintained, as is well known, especially by Kant as a universally valid basis of penal justice.[1] In this sense, that is as a maxim of the deontological order (*de iure condendo*), it is, however, debatable and much debated.[2]

* ["Sul fondamento della giustizia penale." Translated, with Professor Del Vecchio's permission, from his volume, *La Giustizia* (Rome, Studium: 1946), pp. 181-206. The editors of SEMINAR gratefully acknowledge the generous assistance of Dr. Alessandro S. Crisafulli in the preparation of the English text.] This study first appeared, without footnotes and anonymously, in the *Osservatore Romano,* January 10-11 and 12, 1944; thereafter, in the *Archivio Penale,* I (1945), fasc. 3-4. It is here republished with some additions [Author's note].

[1] Kant, *Metaphysische Anfangsgründe der Rechtslehre,* II. 1, general note *E.* Among those maintaining the same thesis, cf. Mamiani, "Fondamenti della Filosofia del diritto e singolarmente del diritto di punire," *Lettere di T. Mamiani e di P. S. Mancini* (Livorno, 1875), pp. 39ff., 51ff. He too ascribes to human society "the duty of realizing on earth the eternal law of equal retribution of evil for evil" and approves in general of the rule of retaliation.

[2] On the opposition to the Kantian penological doctrine since Kant's own days cf. Solari, "Kant e la dottrina penale della retribuzione," *Rivista di Filosofia,* XX (1929), 25-28. Solari's attempt to justify this doctrine philosophically (apart from explaining it historically) has, however, in my opinion, failed and was bound to fail. Among Kant's critics, cf. for instance Franck, *Philosophie du droit pénal* (Paris, 1864), pp. 110ff.; Seeger, "Die Strafrechtstheorien Kants und seiner Nachfolger," repr. from *Festschrift für Berner* (Tübingen, 1892), pp. 20ff.; Höffding, *Morale* (2. ed., Paris, 1907), pp. 525ff.; Jellinek, *Die sozialethische Bedeutung von Recht, Unrecht und Strafe* (2. ed., Berlin, 1908), pp. 99ff., 106ff. Cf. in general Günther, *Die Idee der Wiedervergeltung in der Geschichte und Philosophie des Strafrechts* (Erlangen, 1889-95); Merkel, "Ueber vergeltende Gerechtigkeit," *Gesammelte Abhandlungen aus dem Gebiet der allgemeinen Rechtslehre und des Strafrechts* (Strassburg, 1899), I, 1-14; *id.,* "Vergeltungsidee und Zweckgedanke im Strafrecht," *ibid.,* II, 687-723; Beling, *Die Vergeltungsidee und ihre Bedeutung für das Strafrecht* (Leipzig, 1908); Exner, "Ueber Gerechtigkeit im Strafmass," in his *Gerechtigkeit und Richteramt* (Leipzig, 1922). The impossibility of reaching a true

It is evident that the problem of justifying punishment intrinsically, in conformity with the supreme ideal of justice, cannot be solved by the mere demonstration of the historical origins of punishment itself, or by defining its formal nature, that is, its pertaining to the logical genus of justice (*giuridicità*). As an introduction to the solution of this problem, a few simple observations may be made.

On a purely abstract level, any act performed toward others (therefore, also a criminal act) implies, by the fungible nature of the different subjects in the pure design of justice, the authorization of reciprocating it, that is, makes this juridically possible. But it does not render such reciprocation likewise necessary (mandatory), since there exists no obligation of using the authorization to its full limit. Moreover, within the power of the subject that has suffered a wrong, other juridical possibilities are included as well, such as being satisfied with a mitigated or symbolic counter-act, or even forgiving the wrong, according to the counsel of Christian ethics, especially when the author of the wrong shows repentance

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equation between crime and punishment is particularly stressed by Heimberger, *Der Begriff der Gerechtigkeit im Strafrecht* (Leipzig, 1903), who refers to the concurring opinion of Seuffert (pp. 6, 10ff.). Cf. also Glaser, "L'idea di giustizia nel diritto penale," *Rivista internazionale di Filosofia del diritto*, IX (1929), 769-87. Earlier, Bovio, *Saggio critico del diritto penale* (Naples, 1872; 3. ed., 1883), pp. 32, 37ff., Tissot, *Introduction philosophique à l'étude du droit pénal* (Paris, 1874), pp. 316ff., and others had expressed themselves in the same sense. Already Godwin, *Enquiry Concerning Political Justice and Its Influence on Morals and Happiness*, 7.4 (4. ed., London, 1842; II, 166) remarked: "A further consideration, calculated to show, not only the absurdity of punishment for example, but the iniquity of punishment in general, is that delinquency and punishment are in all cases incommensurable." Röder, *Grundzüge des Naturrechts und der Rechtsfilosofie* [sic] (2. ed., Leipzig, 1860-63), II, vii, compared to the squaring of a circle the insoluble problem, "which extrinsic evil could at all correspond to, and balance the intrinsic evil of guilt?" Cf. *ibid.*, § 124, p. 163ff.; also the same author's article, "Ueber die einzig haltbaren Grundlagen des Strafrechts und Strafvollzugs," in his *Ueber den wahren Rechtsbegriff* (Prague, 1869), pp. 29-47. Also according to E. Ferri, *La giustizia nel secolo XX* (Rome, 1912), p. 29f., "we cannot establish, in the absolute, a criterion of proportion between punishment and crime, because they are heterogeneous and incommensurable entities."

and, as far as possible, makes amends for it.[3] The renouncing of a right, even as the remission of a debt (here we must keep in mind some elementary truths), does not nullify the right itself, it rather presupposes and implicitly affirms it.[4] There is, on the other hand, no contradiction between law and morality, since even here, as always, the law gives consent to, though it does not impose, the fulfillment of the moral obligation.[5] Nor must one confuse, as Kant did, the simple power (which, we repeat, constitutes the abstract limit of right) of returning evil for evil (*malum passionis propter malum pas-*

[3] St. Thomas, *Summa theologica,* 3, q. 46, a. 2, ad 3: "Quicumque homo remittit offensam in se commissam absque satisfactione, misericorditer et non iniuste agit." Cf. Rotteck, *Lehrbuch des Vernunftrechts und der Staatswissenschaften,* III (Stuttgart, 1834), 228.—We may note here that in a system of positive law the above-mentioned power resides not only in the individual but also, and primarily, in the state, the latter being the subject of the juridical order which is hypothetically injured, whereas the powers of the individual, also with regard to the renunciation of a claim, are limited by the laws of the state. This follows from the logic proper to any positive legal system, although, intrinsically, the juridical decisions of the individual conscience are irreducible and, therefore, in a certain sense autonomous; cf. the present writer's article, "Sulla statualità del diritto," in *Saggi intorno allo Stato* (Rome, 1935). The whole problem thus belongs to the legislative and the judicial sphere no less than to that of the individual conscience (*forum internum*). All this, however, does not affect the validity of the maxim expressed above, but only the ways and limits of its application.

[4] Precisely along these lines St. Augustine resolves the conflict between the precepts of the Old Testament ("An eye for an eye, and a tooth for a tooth," etc.) and those of the New: the former represent the juridical limit of the obligation. Cf. *Contra Faustum Manichaeum,* 19.25: "Est enim quaedam iusta vindicta, iusteque debetur ei qui fuerit passus iniuriam: unde utique cum ignoscimus, de nostro quodam modo iure largimur. . . . Quod autem debetur, etsi benigne dimittitur, non tamen inique repetitur. . . . Peccat enim qui exigit ultra debitum, non peccat autem qui exigit debitum: et tutior longe est a peccato iniusti exactoris, qui omnino non exigit debitum" (Migne, *PL,* XLII, 364). *Quaestiones in Heptateuchum,* 2.80: "Debitores igitur lege monstrantur, ut quando ignoscitur appareat quid dimittatur. Neque enim debita dimitteremus, nisi quid nobis deberetur lege indice disceremus" (*ibid.,* XXXIV, 626).

[5] This, to be sure, presupposes a unity of the moral order, which comprises rules of morality and rules of law as necessarily coherent to a certain degree. Cf. Del Vecchio, *Il concetto del diritto* (2. ed., Bologna, 1912), pp. 64ff.

sionis) with a "categorical imperative."[6] For, Kant's doctrine on the moral-juridical basis of punishment is, if I am not mistaken, a paralogism, even more than an undemonstrated assertion.

An indirect proof of this is found in the fact that it is only in primitive custom and legislation that the rigid formula of retaliation is applied and thus a material correspondence between crime and punishment is sought (e.g., by cutting the hand of the thief, the tongue of the slanderer, etc., according to the formula, *per quod quis peccat, per id punitur*); whereas a more developed moral and juridical conscience seeks a conceptual equation or correspondence of values: it transforms or abolishes those kinds of punishment which wound the essence of human personality and degrade not only the one who suffers, but also, and perhaps even more, the one who inflicts such punishment.

All this, of course, does not affect the principle (entirely different in meaning) of legitimate defense against violations of right. This principle is valid in so far as the violation is concretely threatened or undertaken and not only abstractly possible (for right is always physically vulnerable), and within the very restricted limits marked by this precise, actual reason (*cum moderamine inculpatae tutelae*). The legitimacy of defense derives immediately from the very formal notion of law: since the law proportionally delimits the behavior of several subjects, it can only be maintained by admitting the prevention of wrong.

The supreme postulate of justice, at any rate, remains the same also in regard to punishment, as its only universally valid basis: that is, every one, in his relations to others, must

[6] Kant, *Metaphysische Anfangsgründe der Rechtslehre, loc. cit.* Höffding, *op. cit.*, p. 526, states that "this imperative is only an arbitrary ukase"; but he does not point out (nor have others done so, it seems) the origin of the error, i.e. the logical defect of the Kantian doctrine, which, nevertheless, contains some grain of truth. Cf. *Prolegomena zu einer jeden künftigen Metaphysik*, § 58, where Kant correctly speaks of the right (not the duty) of retaliating.

be considered the author of his own acts and take the consequences (principle of subjective responsibility). Hence, the obligation of making amends for evil done to others, and correspondingly the right of claiming such reparation, in a feasibly adequate manner.

II.

A few distinctions, however, are necessary in this matter. To understand and to judge a human act, we must consider not only its external aspect and physical effect, but also the mental or interior element: the will, the intention, and the consciousness. When an act causes unjust harm to others, the obligation of civil reparation arises *ipso facto* with the author of the act, even if he did not have the intention of doing harm: for it is unjust, in any case, that the harm be borne by others than by him. If, however, the unlawful act was performed with deliberate intention (*dolus*) or with such a degree of irresponsibility (*culpa*) as to make it equivalent to *dolus,* the resultant injury does not concern only the individual who is eventually harmed, but also all the members of the same legal order; hence, the necessity of a reparation of a public nature, which goes beyond private compensation, and which constitutes the punishment proper.

The intrinsic justification for punishment lies precisely in that it has the function to repair and restore the violated Law; and in this lies also its rational limit. But the abstract nature of these concepts makes their application very difficult. Hence, errors, and grave ones, in this matter occur frequently in doctrine as well as in positive legislation.[7] To return evil for evil in the same proportion is the most obvious but not the most valid manner of re-establishing the disturbed equi-

[7] Nowhere can the insufficiency and the danger of empty juridical abstraction be better observed than here. Such formulae as proposed by Hegel (*Grundlinien der Philosophie des Rechts,* § 97, Additional Note: "The act of crime is . . . something negative, hence punishment is but the negation of a negation"—cf. also §§ 98-103; ed. 2 [Lasson], 1921, pp. 87ff., 309ff.) can serve and in fact have served to cover the crassest iniquities, since they can be applied to all kinds of punishment, even the most barbarous ones.

librium.[8] Evil is truly repaired only with good.[9] Therefore the following principle is to be affirmed: to the *malum actionis,* constituted by the crime, one must oppose as a requirement of justice, not so much a *malum passionis* (as in

[8] Human justice, according to St. Augustine, is by far inferior to divine justice; it only appears to be justice, precisely because it returns evil for evil, cf. *Ennar. in Ps.* 5.10: "Nam et malum pro malo reddere justitia videtur, sed non est eius de quo dictum est 'Qui facit oriri solem suum super bonos et malos'. . . . Homo autem, cum malum pro malo reddit, malo voto id facit: et ob hoc prior ipse malus est dum punire vult malum" (Migne, *PL,* XXXVI, 87).

[9] Cf. St. Paul: "Be not overcome by evil, but overcome evil with good" (Rom. 12.21); the Psalmist: "Turn away from evil and do good" (Ps. 33 [34].15; cf. 36 [37].27); and St. Peter: "Not rendering evil for evil, or abuse for abuse, but contrariwise, blessing"; "For it is better, if the will of God should so will, that you suffer for doing good than for doing evil" (1 Petr. 3.9, 17). It is well known that time and again the attempt has been made to reconcile these concepts, by way of several, more or less ingenious distinctions, with the use and abuse of even the most cruel penalties against the authors of crimes, true or supposed ones. But such artificial cerebrations threaten to obliterate the original spirit of the scriptural doctrine.—This spirit was made an absolute standard by Tolstoy, with important conclusions drawn as regards punishment; cf. especially his *I cannot be silent* and his correspondence, *Ueber das Recht: Briefwechsel mit einem Juristen* (tr. A. Skarvan, with a preface by E. Schmitt; Heidelberg, 1910). Cf. also Tolstoy's censure of penal systems in the novel, *Resurrection.* His conception of Law, however, is deficient, inasmuch as it would lead to a denial even of legitimate defense and the right of claiming damages. On Tolstoy's moral and juridical ideas cf. Ossip-Lourié, *La philosophie de Tolstoi* (Paris, 1899), esp. pp. 129ff.; Kovalevsky, "La morale de Tolstoi," in *Morale sociale* (Paris, 1899), pp. 162-91; Eltzbacher, "Die Rechtsphilosophie Tolstojs," *Preussische Jahrbücher,* C (1900), 266-82; Cresson, "Le Christianisme de Tolstoi," *Revue de Métaphysique et de Morale,* IX (1901), 749-73, esp. 767f.; Petrone, *F. Nietzsche e L. Tolstoi* (Naples, 1902), pp. 127-63; A. S. Goldenweiser, *Das Verbrechen als Strafe und die Strafe als Verbrechen* (Berlin, 1904); Dorado, *El derecho protector de los criminales* (Madrid, 1916), II, 579-609; A. Goldenweiser, Jr., "Tolstois Kampf gegen das Recht," *Archiv für Rechts- und Wirtschaftsphilosophie,* XXII (1928), 98-116; M. Markovitch, *J. J. Rousseau et Tolstoi* (Paris, 1928), pp. 159ff.; Sapir, *Dostojewsky und Tolstoi über Probleme des Rechts* (Tübingen, 1932). See also the critical observations by Stammler, *Lehrbuch der Rechtsphilosophie* (3. ed., Berlin, 1928), p. 208; Radbruch, *Rechtsphilosophie* (3. ed., Leipzig, 1932), pp. 38, 94, and Del Vecchio, *Il fenomeno della guerra e l'idea della pace* (2. ed., Turin, 1911), pp. 51ff.

the old formula),[10] but rather a *bonum actionis,*[11] that is, a reverse activity of the author of the crime itself, which nullifies or reduces its effects as far as possible. A certain pain, it is true, cannot be separated from the fulfillment of such an obligation, especially when the latter is an object of coercion. Also repentance (remorse) is painful by its nature and as such is (or should be) the prerequisite for an act of reparation.

[10] As is known, Hugo Grotius defined punishment as "malum passionis quod infligitur ob malum actionis" (*De iure belli ac pacis,* II, c. 20, § I, 1). This notion goes back to the beginnings of criminal law and is still generally accepted. Cf., e.g., Carmignani, *Elementi di diritto criminale* (Milan, 1863), p. 105; Carrara, *Programma del corso di diritto criminale* (3. ed., Lucca, 1867), p. 333; P. Rossi, *Trattato di diritto penale* (Milan, 1853), p. 359, etc.—Pessina, *Elementi di diritto penale,* I (Naples, 1882), p. 330, accepts on the whole the formula of Grotius but denies, by way of an excessively subtle distinction, that this formula means returning evil for evil, because punishment "is not the suffering of an evil but the evil of a suffering." Florian, *Trattato di diritto penale: Parte generale,* II (4. ed., Milan, 1934), 762, envisages a "criminal law of the future" in which punishment "may or may not represent an evil for the criminal"; but he recognizes that "the concept of punishment as it exists in the codes of today is still the traditional one, i.e. an evil inflicted upon the guilty criminal." Also according to Battaglini, *Diritto penale: Teorie generali* (Bologna, 1937), p. 308, "there is no doubt that punishment, as it has been handed down from the past and as we still conceive of it in our legal orders, is essentially a means of affliction. This is recognized by the common opinion, which unanimously declares that punishment is an evil, a suffering, a pain." For Canon Law, cf. Lega, *Praelectiones in textum iuris canonici: De delictis et poenis* (2. ed., Rome, 1910), p. 86: "Poena definiri potest: Malum passionis propter malum actionis a competenti potestate sancitum": Wernz-Vidal, *Jus canonicum,* v. VII, *Jus poenale ecclesiasticum* (Rome, 1937), p. 170: "Malum quoddam passionis aut privationis . . . ad conservandum socialem Ecclesiae ordinem juste inflictum"; also Cavagnis, *Institutiones juris publici ecclesiastici,* I (4. ed., Rome, 1906), 76.

[11] Because it is so simple, this formula could appear all too obvious, like a commonplace. Still, I am not aware that heretofore it has been stated or applied to the problem on hand. Perhaps here, too, the adage at times invoked by Schopenhauer is valid: *Simplex sigillum veri.* The formula itself and, let us add, its truth, results however directly from the biblical maxims quoted above, the moral significance of which has never been seriously questioned by anyone. Among the few writers on criminal law who to some extent come near this conception, mention should be made of Röder, especially of the second of his two writings cited above, note 2. Cf. also Saleilles, *L'individualisation de la peine* (Paris, 1898), p. 11.

From this it is evident that crime, as a rule, finds its punishment in itself rather than in something else.[12] But to inflict pain on others, even under the guise of retaliation, cannot be in itself a legitimate end, in the light of the supreme moral ideal.[13]

According to the same ideal, it is even less admissible to treat the human person as a mere thing, that is, as a means to an extrinsic end: as it happens when someone is given a non-deserved punishment or one disproportionate to the wrong committed, for the purpose of intimidating or dissuading others from following his bad example. A just punishment within the limits indicated above naturally has such a pedagogic, educational effect. But this intent can never be a valid reason for rendering plausible a punishment which is excessive or in itself unjust.

For the same reason one certainly cannot accept that maxim by which an attempt was made to justify the most iniquitous

[12] If subjective conscience is not an empty word but a fundamental truth, both the reward for good and the punishment for evil reside in it: "La plus grande peine d'une mauvaise action sera d'en être convaincu," says Montesquieu (*De l'esprit des lois,* Bk. VI, ch. 9); and, "Le châtiment du crime est de l'avoir commis," Anatole France (*Sur la pierre blanche,* p. 90). Wherever conscience is distorted or obscured, it is necessary to educate and enlighten it; wherever it is completely lacking, there can be no question of merit or demerit, nor, therefore, of reward or punishment.

[13] Already Plato in Socrates' name (and, probably, Socrates himself), partly anticipating one of the loftiest doctrines of Christianity, refuted the opinion according to which justice consists in doing good to friends and evil to enemies. According to him it is a characteristic of the just man not to harm either a friend or anybody else: *οὐκ ἄρα τοῦ δικαίου βλάπτειν ἔργον, οὔτε φίλον οὔτ' ἄλλον οὐδένα, ἀλλα τοῦ ἐναντίου, τοῦ ἀδίκου* (*Rep.* 1.9; cf. also *Crito,* 10). The opposition between the two conceptions of justice, and of ethics in general—according to which the possibility of returning evil for evil is admitted or denied—is evident in the words of the Gospel, "Unless your justice exceeds that of the Scribes and Pharisees, you shall not enter the kingdom of heaven" (Mt. 5.20); "You have heard that it was said, 'Thou shalt love thy neighbor, and shalt hate thy enemy.' But I say to you, love your enemies, do good to those who hate you . . ." etc. (*ib.* 43-44). Also in Jewish morals, expressions of this second, higher concept are not lacking, cf. Bonsirven, *Le Judaïsme palestinien au temps de Jésus-Christ* (Paris, 1935), II, 202, 204ff.

sentence in all human history: "It is expedient for us that one man [however innocent] die for the people instead of the whole nation perishing." [14] We know that this maxim has been adopted and expanded in different ways by the theorists of the raison d'état; [15] but it is as deceptive as it is vile.[16] The truth is that an innocent man can indeed lay down his life for the public good, but he cannot be condemned to do so, lest there result from such a manifestly unjust condemnation shame and harm for those very persons who should have benefited from it.[17]

Another necessary limitation in this matter results from the fact that the actual complexities and interconnections in the relations of several persons make it sometimes impossible to punish the guilty without at the same time harming innocent

[14] John 11.50; cf. 18.14.

[15] On this argument in general, see Meinecke, *Die Idee der Staatsräson in der neueren Geschichte* (3. ed., Munich, 1929).

[16] Rousseau, with justified indignation, protested against this maxim: "Si l'on entend qu'il soit permis au gouvernement de sacrifier un innocent au salut de la multitude, je tiens cette maxime pour une des plus exécrables que jamais la tyrannie ait inventées, la plus fausse qu'on puisse avancer, la plus dangereuse qu'on puisse admettre, et la plus directement opposée aux loix fondamentales de la société" (*De l'économie politique,* in *Oeuvres,* ed. Lefèvre, IV, 235). Cf. Kant, *Metaphysische Anfangsgründe der Rechtslehre* (2. ed., 1798), p. 226; also Manzoni, "Del sistema che fonde la morale sull'utilità," appendix to ch. 3 of his *Osservazioni sulla morale cattolica* (*Opere,* ed. Lesca, p. 221): "The public utility has always been a pretext for violating justice."

[17] According to Anatole France, the image of Christ is out of place in courts, because it is not in harmony with the "justice" practiced there (cf. *Crainquebille,* pp. 6-8). Gaffiot, *Les théories d'Anatole France sur l'organisation sociale de son temps* (Paris, 1928), p. 191, remarks that no judge could, logically, pass a death sentence in the name of Christ, himself the victim of a miscarriage of justice. (But one may well point out that precisely the memory of that abominable miscarriage of justice should be salutary, by inducing judges to be most scrupulous in their deliberations, and wisely moderate in applying penal laws, which often are excessively harsh even in our day.) On Anatole France's ideas concerning justice, and especially his radical criticism of penal law, see Gaffiot, *op. cit.,* p. 187ff. It is significant that notwithstanding the difference of premises, France's conclusions in this matter coincide with those of Tolstoy, cited above, n. 9.

parties, too. The maxim of the Tyrant, in Tasso's famous verse, "Let the just perish, so the guilty fall," [18] evidently contradicts the most certain postulate of justice and must be absolutely inverted: "Let not the guilty fall if thus the just be spared."

On this it seems there can be no doubt. But if we truly want to follow this concept it is necessary to go even further and to consider not only the direct effects of the sentence, but also the indirect ones. It follows from the closeness of the family bonds that penalties (and particularly the graver ones, e.g., long term or life imprisonment) weigh heavily not only on the criminal, but also on his innocent relatives. No one maintains that this is just, but it is generally believed that it is inevitable. For this reason perhaps lawyers are not wont to study the problem. The question, however, might be raised whether it would not be possible to conciliate to some extent the divergent demands of justice by reducing or suspending in specific cases the penalties which are abstractly foreseen or even inflicted, so that the suffering of innocent and needy persons may be alleviated, if not eliminated. This is advisable also in order that the criminal may fulfill at least in part his obligations, not only towards society and the persons injured by him, but also toward those whom he was bound to support with his work. To be sure, this is a very difficult problem, and perhaps it will never be solved perfectly in the complex and precarious reality of human guilt and wretchedness. Nevertheless the problem in our opinion deserves to be posed in its proper terms, so that the efforts of legislators and judges may be directed accordingly.[19]

[18] Tasso, *Gerusalemme liberata,* cant. 2.12 [Hoole's translation].

[19] Faint traces of an application of the indicated criterion can be found in the provisions concerning the treatment in prison of pregnant women and of mothers nursing infants. In a different field, one may also consider by analogy the provisions which grant partial or temporary exemption from military duty to those who have certain family responsibilities.

III.

The elementary principles pointed out in the preceding pages have not always been observed, but rather have often been violated in penal institutions and proceedings (and this not only in remote times and among barbarous peoples), with the result that the sacred name of justice has been defiled. This is too well known a fact to require particular demonstration. Whoever considers without preconceptions in its tragic reality the series of aberrations which in this field have taken place over the centuries, must admit that many pages of the history of punishment are just as shameful for humanity as is the history of crime.[20]

We should be fully aware that, in the light of the aforementioned principles, penal justice should somewhat reduce even its present field of action, modifying more or less radically many of its institutions. This is true also for those nations which have already carried out remarkable reforms in this field. Some of these reforms, introduced recently in the legislations of various peoples, indicate a tendency still in the stage of development, and it seems that they can be considered as a partial approximation of the postulates expressed above. One may cite, e.g., such institutes as the conditional suspension of penalties and judicial pardon; reformatory farms (*case di lavoro all'aperto* and *colonie agricole*) as a means of re-educating the delinquent; juvenile courts with

[20] Beccaria, *Dei delitti a delle pene*, §§ xxvii-viii (*al.* xv-xvi): "Who is not horrified, in reading history, by the barbarous and useless torments coldbloodedly invented and executed by men who were called wise? . . . This useless mass of executions has never made men better." Cf. Voltaire, *Prix de la justice et de l'humanité*, art. 28 (*Oeuvres*, Paris, 1785; XXIX, 347); Paine, *Droits de l'homme* (2. ed., Paris, 1793), I, 50f. Also according to A. von Feuerbach, historical experience teaches that "grausame Gesetze, indem sie die Gemüther abstumpfen gegen die Furcht vor den Strafen, viel mehr eine Ursache von Verbrechen, als ein Mittel sind wider dieselben" (*Biographischer Nachlass*, 2. ed., Leipzig, 1853; I, 132). See also the profound criticism of Godwin, *op. cit.* (note 2, *supra*), II, 154ff. Also according to Höffding, *Morale* (2. ed., Paris, 1907), p. 515, cruel punishments are a danger for the social peace.

their appropriate regulations—designed, like the judicial pardon, to avoid for youths those forms of punishment which, as experience shows, produce perversion rather than correction.[21] In such cases and others, all of an exceptional nature, penal justice renounces, so to speak, the rigorous application of the criteria that still form the basis of the penal systems now in force: here afflictive punishment is no longer considered as absolutely necessary and effective in itself to compensate, almost mechanically, for the offense; but it is suspended, attenuated, or replaced by other means of correcting the will and of re-establishing the violated right.[22] The tendency of

[21] The pernicious effects of penal systems still in use have often been noted, perhaps with some exaggeration, but unfortunately often with some foundation of truth. Berrini, *La giustizia—Problemi giudiziari italiani* (Milan, 1921), p. 42, observes: "By a well-coined expression, prisons have been called the universities of crime." The governments, he goes on to explain, spend enormous sums on institutions which return the convict to society as a greater criminal than he was before.—To be sure, in recent provisions enacted in various countries the attempt has been made to obviate at least the most grave inconveniences of the system; but in reality the evil is too deep-rooted to be cured without much more radical reforms. Some pertinent data (which are, however, far from offering an integral solution of the problem) may be found, e.g., in Gunzburg, *Les transformations récentes du droit pénal interne et international* (Paris, 1933), or in Grandi, *Bonifica umana* (Rome, 1941).

[22] In this connection, some rules of Canon Law are worthy of note, because they are inspired by conceptions broader than those which prevail in secular legislations. Cf., e.g., *Codex iuris canonici,* can. 2223, § 3: "Conscientiae et prudentiae iudicis vel Superioris committitur: 1°, Poenae applicationem ad tempus magis opportunum differre, si ex praepopera rei punitione maiora mala eventura praevideantur; 2°, A poena infligenda abstinere, si reus perfecte fuerit emendatus, et scandalum reparaverit, aut sufficienter punitus sit vel puniendus praevideatur poenis auctoritate civili sancitis; 3°, Poenam determinatam temperare vel loco ipsius aliquod remedium poenale adhibere aut aliquam poenitentiam iniungere," etc. Cf. also can. 2214ff. When the present study was first published, F. A. Liuzzi ("La giustizia penale e la Chiesa," *L'Osservatore Romano,* February 18, 1944) called especial attention to these provisions of the penal law of the Church, since in a certain degree they correspond to the general principles expounded here. This is, in part, correct; and no other confirmation could have greater weight. There is no doubt that secular legislation could, in this and in many other matters, profit from a careful comparison with, and a deliberate approximation to Canon Law, all the more so since the latter has attained a considerable degree of perfection in the new Code. It would be superfluous here to speak of historical phases

this policy is to respect, within certain limits, but certainly

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of the past; in general, one can observe that the penal law of the Church has undergone, notwithstanding the immutability of certain principles, an evolution similar to that of secular criminal law. Cf., e.g., Wernz, *Jus decretalium,* VI, *Jus poenale Ecclesiae catholicae* (3. ed., Prati, 1913), 99; Wernz-Vidal, *Jus canonicum,* VII, 345. As an example of recent progress, in the Church as well as in state legislation, one may recall the *damnatio condicionalis,* or conditional suspension of the penalty (can. 2288), qualified as "novum institutum iuridicum per Codicem formaliter introductum in ius poenale Ecclesiae" by Wernz-Vidal, *op. cit.,* VII, 357; cf. Chelodi, *Ius poenale et ordo procedendi in iudiciis criminalibus* (4. ed., Trent, 1935), p. 63f. Actually, the penal law of the Church has always, and particularly in modern times, maintained close contacts with secular criminal law, including frequent instances of *renvoi,* with or without formal *canonizatio legum.* Cf. can. 2198; Wernz-Vidal, *op. cit.,* VII, 509. (As for the State of Vatican City, cf. the *Legge sulle Fonti del Diritto* of June 7, 1929, art. 4: "With the reservations expressed in the preceding article, the Penal Code now in force in the Kingdom of Italy, together with the laws that have modified or integrated the said Code before the present Statute becomes effective, and with the relative decrees (*regolamenti*), shall be observed in Vatican City" [*Acta Apost. Sedis,* suppl. I, No. 1, June 8, 1929, p. 6]). For this reason, certain portions of penal law which do not affect religion directly have not been given, especially in our time, a legislative and judicial elaboration of their own in Canon Law. Still, such an elaboration would offer great interest, because it would show how the principles noted above (can. 2223, etc.) are actually functioning in a wider field.

The rapprochement between secular and Canon Law must, however, stay within the proper limits. Canon Law, for instance, provides for the judicial power of inflicting penalties in cases not contemplated in positive law (can. 2222; for Vatican City, see the *Legge* cited above, art. 23): this rule follows from the special character of Canon Law, but could not serve as a model for the criminal law of the modern state, which over the centuries has gradually evolved the principle, *nulla poena sine lege,* as a fundamental guarantee of civil liberties. (Nowadays, however, the principle is again under discussion.)—On the peculiar nature of ecclesiastical penal law and the various phases of its development, cf. Friedberg-Ruffini, *Trattato del diritto ecclesiastico cattolico ed evangelico* (Turin, 1893), pp. 418ff.; Hollweck, *Die kirchlichen Strafgesetze* (Mainz, 1899), Introd.; Cavagnis, *Institutiones iuris publici ecclesiastici,* I, 180ff.; Schiappoli, "Diritto penale canonico," in *Enciclopedia del diritto penale italiano,* ed. Pessina, I (Milan, 1904), 625ff., 655ff.; Eichmann, *Das Strafrecht des Codex iuris canonici* (Paderborn, 1920); Jemolo, "Peculiarità del diritto penale ecclesiastico," in *Studi in onore di F. Cammeo* (Padua, 1933), I, 721-33; Ottaviani, *Institutiones iuris publici ecclesiastici* (2. ed., Rome, 1935), I, 323ff.; Michiels, *De delictis et poenis* (Lublin, 1934); Wernz-Vidal, *op. cit.;* F. Roberti, *De delictis et poenis,* I (2. ed., Rome, 1938); Pellé, *Le droit pénal de l'Église* (Paris, 1939); Romani, *Summa iuris canonici lineamenta* (Rome, 1939), pp. 265ff.; Della Veneria, *L'Inquisizione medioevale ed il processo inquisitorio* (Milan, 1939), pp. 153ff.

more than in the past, the personality of the offender, which always retains something sacred and must not be crushed or denied, not even for a supposed equation between evil done and evil rendered, lest the dignity of those very persons be debased who deny it or crush it.[23]

It would be foolish to presume that a fact could be actually undone (*factum infectum nequit fieri*). Likewise there is in every crime committed, strictly speaking, something irreparable. To be sure, the compensations that penal as well as civil justice can impose, correspond to a fundamental necessity, which is the very essence of justice, but they are restricted by the factual circumstances as well as by the moral necessity of not committing another crime, duplicating thereby the first one for the purpose of cancelling it.[24] Reparation and compensation must approach, as far as possible, their proper end, but above all must aim at a moral equivalence and safeguard in any case the *ratio iuris*, in the highest sense of the term. Therefore a partial or indirect, or even a mere symbolical satisfaction must suffice whenever reparation is otherwise impossible without a new and perhaps graver injustice. The full satisfaction obtained by atrocious executions is moreover only apparent, and so is the necessity of

[23] The Soviet Penal Code formally and absolutely rejects the traditional concept of retribution (evil for evil); according to its art. 9, penalties are considered as "measures of social defense" and "shall not have the purpose of inflicting physical suffering or humiliating human dignity; nor is their end retribution or chastisement." Cf. *Les Codes de la Russie soviétique*, IV, tr. J. Patouillet (Paris, 1935), 10. It seems, however, that the particular dispositions in the Soviet Code itself (let alone the actual practice) do not correspond to such theoretical pronouncements; see A. Maklezow, "Das Strafrecht," in *Das Recht Sowjetrusslands* (Tübingen, 1925), pp. 378ff.; C. Perris, "Le nuove teorie penali della Russia sovietica," *La Scuola positiva* (1931), pt. I, pp. 1-21; P. Garraud, Introd. to the French translation, esp. pp. xxxviiff.

[24] Plato, *Crito*, 10.49c: Οὔτ' ἄρ' ἀνταδικεῖν δεῖ οὔτε κακῶς ἀντιποιεῖν οὐδένα ἀνθρώπων, οὐδ' ἂν ὁτιοῦν πάσχῃ ὑπ' αὐτῶν. St. Thomas, *Sum. theol.*, 2.2, q. 108, a. 1c: "Non enim debet homo in alium peccare propter hoc quod ille peccavit prius in ipsum."

having recourse to such means,[25] even though a general and deep-rooted opinion is still predominantly in their favor.[26] In order to appreciate objectively the value of this and other such opinions, it is necessary to recall, for example, that until recent times it was the almost unanimous conviction of jurists that torture is an indispensable means for realizing justice.[27]

[25] Arguments on the necessity and usefulness of punishment often run in a vicious circle. The only real necessity is justice: once this is violated, be it even in the guise of law, an impulse for transgressing the latter follows. In its turn, the transgression then becomes a motive for other laws, more severe and even more unjust. "La puissance des lois," Rousseau observed rightly, "dépend encore plus de leur propre sagesse que de la sévérité de leurs ministres, et la volonté publique tire son plus grand poids de la raison qui l'a dictée. . . . En effet, la première des lois est de respecter les lois: la rigueur des châtiments n'est qu'une vaine ressource imaginée par les petits esprits pour substituer la terreur à ce respect qu'ils ne peuvent obtenir" (*De l'economie politique, ed. cit.*, p. 228).

[26] According to Ferri, when capital punishment was abolished in Italy, it was feared that there would be an increase in murder, whereas the contrary actually happened; E. Ferri, *La giustizia nel secolo, XX*, p. 11. On the low efficacy of punishment, see the same author's *Sociologia criminale* (5. ed., Turin, 1929-30), I, 421ff.

[27] To cite one authoritative example only, Cardinal De Lugo (d. 1660) reasoned as follows: "Sine illa [tortura] audiciores homines essent ad delinquendum, cum plerumque non possint delicta plene probari sine propria confessione, et haec non haberetur communiter sine tortura. Quare, licet periculum sit ne innocentes torqueantur, et ne dolore coacti fateantur quod non peccarunt: minus tamen reputatur hoc malum quam quod ex impunitate scelerum respublica humana pateretur; ex duobus autem malis minus est eligendum quando utrumque vitari non potest" (*De iustitia et iure*, disp. 37, sec. 13; *Opera*, ed. Fournials, Paris, 1868-69; VII, 729). In the same treatise, there follows a minute listing of cases in which torture could be applied, e.g. on women (except in the period of pregnancy and childbirth), on children of the age of fourteen, etc. These are arguments and rules which at that time represented the *communis opinio* (cf. Mancini, *Sommi lineamenti di una storia ideale della penalità* [Rome, 1874], pp. 41ff.), but which today no lawyer and, in general, no man with self-respect would dare to approve. The change which has taken place in this matter leads one to doubt the validity of certain doctrines, still dominant, which consider as just and necessary certain penal procedures and institutions handed down to us by tradition. Cf. Heimberger, *op. cit* (note 2, *supra*), p. 11; similarly Dorado, *El derecho protector de los criminales* (Madrid, 1916), I, 523f.; Toulemon, *Le progrès des institutions pénales* (Paris, 1928), p. 234. Compare J. S. Mill, *Utilitarianism*, ch. 5 (12. ed., London, 1895), p. 94: "The entire history of social improvement has been

IV.

Evil in the world has such vast and deep roots that Law (the lawyer himself must admit) can not be a sufficient defense against it. The illusory prejudice that the struggle against crime must be carried out exclusively by juridical sanctions, and that delinquency can be adequately repressed through them, is probably one of the causes why other institutes and means of correction and prevention have not until now found the development required by such an important end.[28] To reduce penal law to its proper limits as marked by higher and truer justice does not in any way mean the abandonment of this struggle, but can be rather an incentive for the intensification of that other, moral and social, activity which leads to the same end with probably greater efficacy.

Crime is not only an individual fact, for which its author must make reparation as much as possible; it is also, especially in its graver and more enduring forms, a social fact, which indicates a deficient and unbalanced structure of the society in which it has sprung up.[29] Crime, therefore, gives rise to a number of other problems, besides that of punishment and the reparation owed by the offender: moral, political, educational, economic problems, and we may well add, legal problems, in so far as law regulates human life in general, beyond the narrow compass of penal liability.[30] All

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a series of transitions, by which one custom or institution after another, from being a supposed primary necessity of social existence, has passed into the rank of an universally stigmatized injustice and tyranny."

[28] Admonitions to this effect have not been lacking in past and present, but usually they were little heeded. Montesquieu, *De l'esprit des lois,* VI, ch. 9: "Un bon législateur s'attachera moins à punir les crimes qu'à les prévenir; il s'appliquera plus à donner des moeurs, qu' à infliger les supplices." See also, against the excessive and useless severity of penal laws, *ibid.,* ch. 12.

[29] The extent to which the social conditioning of crime should be taken into account as a coëfficient factor in the punishment of criminals, was eloquently pointed out by Capograssi, *Riflessioni sulla autorità e la sua crisi* (Lanciano, 1921), p. 21, and long before him, by Rosmini, *Antropologia in servigio della scienza morale* (Milan, 1838), p. 459.

[30] Mazzini, *Doveri dell'uomo,* § 1 (*Scritti editi e inediti,* XVIII, 1891, p. 14): "How will you prove to the individual that he must unite his will to

human powers and forces can and ought to cooperate, directly or indirectly, in the solution of these problems, guided by the ideal of justice as a directing principle and a supreme light which indicates and teaches the fundamental value of the human person, the absolute obligation of respecting it, the necessity of healing evils and of eliminating abuses, iniquities and oppressions, however and wherever they appear in human relations.

Crime represents for everybody a warning and, in a certain sense, an object of atonement through the disturbance which it causes not only to the individual who has been harmed, but also to all the members of the same social and legal order. The warning is all the stronger and must be all the more readily heeded when it is impossible to obtain from the offender a direct reparation of the harm. It is not out of place to think, then, of a kind of obligation for reparation which rests in such a case upon society and upon the nation that embodies it, in favor of the victim of the offense; or, if it seems excessive to speak, in the present phase of social and juridical evolution, of an obligation for reparation in a strict sense, it can at least be maintained that there is an obligation of assistance, which means also the acknowledgment of that

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the will of his countrymen and fellow-men? By means of the executioner, or of prisons? Society up to now has acted in this way. But this is war, and we want peace; it is tyrannical repression, and we want education." Compare also the memorable and important reflections of Luigi Settembrini, *Ricordanze della mia vita* (1879; ed. Bari, 1934; II, 41): "O ye makers of law and ye judges of men, answer and tell me: Before these men fell into crime, what did you do for them? Did you instruct them in their childhood and counsel them in their youth? Did you relieve their poverty? Did you educate them by means of work? Did you teach them the duties of their station? Did you explain the law to them? Ye who call yourselves lights of the world, did you enlighten these men who walked in the darkness of ignorance? And if you did not do this, which was your duty, are you not guilty of their crimes? Who gives you the right to punish them? Ye who punish them according to your law and your justice, shall be judged according to another law and another justice." It is noteworthy that identical considerations, almost in the same words, were later expressed by Tolstoy in the novel, *Resurrection,* and in other writings.

part of guilt which belongs to all of society in the very fact that crime exists.

The more it becomes evident that it is impossible to solve by the mere forms of penal law the problems that arise from delinquency, the more—I repeat—must one direct one's attention to other means of struggle and protection against it. We should not forget, in this regard, that justice itself as a fundamental requirement of conscience can be practiced and applied in other ways besides those sanctioned by codes and laws. Justice resides, first of all, in individual consciences; next, it is expressed in practices and customs (where the moral bond is often transformed, almost imperceptibly, into a legal bond, or is fused with it); finally, and only partly, does it become defined in legislative texts—which however do not stem the flow of its natural source.[31] The maxim, "everyone must be treated according to his merit," serves as a guide in social relations, even where it is embodied in formal precepts. For, within or beside the laws a certain power of choice is left to every person (identical in substance with the so-called discretionary power of public administrations); a power which finds its proper norm in that maxim of justice.

The consequences of the application of this norm (especially when it is, as it should be, general and constant) have in the practical course of life the greatest importance and constitute by themselves a reaction, both efficient and legitimate, against the disturbers of the moral and legal order,

[31] As is well known, there is a creative element, that is, a certain sphere of autonomy, in the very function of the judge who acts under the law. Hence both judge and legislator must be directly inspired in their creative activity by the idea of justice. This becomes in particular evident when the judicial activity takes place (as is also possible) in a field not previously regulated by positive law, or where the law is too generic and insufficient: here the formulation of the general rule coincides with the decision of the individual case. "The administration of justice is perfectly possible without law at all," as Salmond has remarked (*Jurisprudence*, 7. ed. [London, 1924], p. 40; Parker's revised ed. [1937], p. 52). Likewise, justice can and must be sought and applied autonomously by the individual in his relations with others, even in situations not covered by legislative and judicial provisions.

whether or not they be reached by penal sanctions. Public blame and public disrepute, based not on partisan hatred but on a calm and strong spirit of justice in a morally wholesome society, are perhaps of more value than punishment in making the guilty feel the necessity of rehabilitating himself. This can happen only through interior conversion and the reparation of the harm done—things that are not easily obtained by prisons and executions. On the other hand, the author of a wrong, having served a sentence, or in some way gone through a criminal trial, is often considered " square " with society and may even find himself in very comfortable circumstances without having repaired the harm done, thus leaving his debt unsettled. This is a sign of imperfect development of the moral conscience in society itself, which declares itself satisfied with the extrinsic fact of punishment, without aiming at the intrinsic fulfilment of justice.[32]

V.

One last observation may be added for completeness. Justice can be realized in certain forms even without special organs of legislation and jurisdiction. This becomes evident if one considers that species, or subspecies, of justice which,

[32] The institution of a debtor's prison has been generally abolished in modern legislations, and rightly so, since depriving the debtor of his liberty is certainly not in itself the proper way of satisfying the demands of justice. But what could indeed be instituted, is a special " court for the protection of the creditor," for the purpose of keeping an eye on the living standard of those who have not settled their legally recognized debts, so that at least the most serious offenses against good faith and morals may be eliminated. If the debt results from a deed which constitutes also a criminal offense, or from an act of negligence bordering on malice (*dolus*), the protection could also take place through the imposition of some specific work, according to the ability of the debtor, after considering all the circumstances, and always in humane and civilized forms, to be established by the law. Such a court order, having as its sole aim an equitable reparation of the harm done both to individuals and to society, would have nothing in common with the rather aimless cruelty of the death penalty or straight imprisonment. This brief note must suffice here; but it seems to me that the subject deserves to be studied at least with the same care that today is used, e.g., in determining (without any scientific basis) the number of years, months, and days of imprisonment appropriate to the different offenses.

while it has the same basis as penal justice, forms its counterpart: namely, rewarding or remunerative justice.[33] There is

[33] This form of justice belongs, according to the traditional division, to the category of *iustitia distributiva,* although it has also been considered differently at times. Until now it has been little studied. In general, references to it are but incidental, as for instance in the well-known words of Ulpian, *Dig.,* 1.1.1.1: "Justitiam namque colimus . . . bonos non solum metu poenarum, verum etiam praemiorum quoque exhortatione efficere cupientes." For a comparison between Roman and modern ideas on this subject, see Jhering, *Der Zweck im Recht* (4. ed., Leipzig, 1904-5; I, 140ff.). According to St. Thomas, *Summa theol.,* 2.1, q. 92, a. 2, ad 3, "praemiare potest ad quemlibet pertinere; sed punire non pertinet nisi ad ministrum legis, cuius auctoritate poena infertur; et ideo praemiare non ponitur actus legis, sed solum punire." Scholastic philosophy discussed the subject especially with regard to the aspects of divine justice (cf., e.g., Suarez, *De iustitia qua Deus reddit praemia meritis et poenas pro peccatis* [*Opera,* ed. Berton, Paris, 1856-61; vol. XI]) or, indirectly, in connection with *acceptio personarum,* i.e., the *vitium oppositum iustitiae distributivae* by which offices are conferred on the unworthy (thus e.g., St. Thomas, *Summa theol.,* 2.2, q. 63; Sanchez, *Consilia seu opuscula moralia,* II, c. 1, dub. 1 and 36 [Paris, 1723; I, 87ff. and 114ff.]; De Lugo, *De iustitia et iure,* disp. 34-35 [*ed. cit.,* VII, 548ff.]). But the problem has also been treated directly with regard to human justice, cf. e.g., Mariana, *De rege et regis institutione,* III, 12 (ed. Moguntiae, 1605, p. 311); Suarez, *De legibus ac Deo legislatore,* I, 17, 10; Winsheim, *Politicae observationes circa principem* (Jenae, 1685), pp. 319ff.; Ferraris, *Prompta bibliotheca,* art. "Jus, justitia," (ed. Rome, 1784-90; IV, 496); Waffelaert, *De iustitia* (*Tract. theologici de virtutibus cardinalibus,* II, Bruges, 1886), II, 346, 355ff.; Pesch, *De virtutibus moralibus* (*Praelect. dogmaticae,* vol. IX, 2. ed., Freiburg Br., 1902), p. 109f. Political theorists have often touched upon the criteria to be followed in rewards or remunerations, but discussed the matter from the viewpoint of public utility rather than that of justice. Cf., e.g., Bodin, *De la République,* 5.4; Montesquieu, *De l'esprit des lois,* 5.18; Beccaria, *Dei delitti e delle pene,* § 44 (*al.* § 41 i.f.); Filangieri, *La scienza della legislazione,* 4.44 and 54; Romagnosi, *Dell'uso della dottrina della ragione,* etc., § 598 (*Opere,* ed. De Giorgi, I, 723f.).—G. Dragonetti, *Delle virtu e de' premj* (2. ed., Modena, 1768), p. 15f., sustained the thesis that "virtues and rewards must be proportionate; the proportion being determined by the good that both virtues and rewards contribute to society, and by the sacrifices involved in both. This is the balance which distributive justice among all nations should never allow to be snatched from its hands." For a more penetrating treatment, see Bentham, *Théorie des peines et des récompenses,* pt. II (*Oeuvres,* ed. Dumont, II, Bruxelles, 1829, pp. 129ff.); M. Gioja, *Del merito e delle recompense* (Milan, 1818; new ed., Lugano, 1848). Bentham's treatise contains important juridical observations. P. L. Albini, *Saggio analitico sul diritto e sulla scienza ed istruzione politico-legale* (Vigevano, 1839), pp. 97ff., called attention to "remunerative law" and suggested the drafting of a "code of

no doubt that even rewards and honors in general must be distributed according to merit, that it to say, given to the worthiest. Therefore the most honorable, wise and able persons must not only enjoy greater respect and esteem, but must actually be given preference in the conferring of public offices. This necessarily corresponds to the greater common good. We need not recall that already Plato essentially includes this concept in his ideal plan of the Republic,[34] and that Aristotle more or less opens his specific treatment of justice with this thought, reaffirming it more particularly in his Politics.[35] Nevertheless, while no one contests the truth of this maxim, its realization remains almost completely entrusted to that free power of choice mentioned above in connection with the

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merits and rewards corresponding to the code of crimes and penalties." Similarly, G. P. Tolomei, *Corso elementare di diritto naturale o razionale* (2. ed., Padova, 1855; II, § 629). Among more recent authors, cf. De le Grasserie, "Droit prémial et droit pénal," *La Scuola positiva,* X (1900), 385-402, who incorrectly considers himself a pioneer in this field; F. Holbach, *Justice laudative: Recherche des éléments d'un droit social complémentaire de la justice pénale* (Brussels, 1904), who considers the "droit laudatif ou remunerateur" as a law actually being in its formative stage, and in analogy to penal law; the latter he qualifies, with a certain reason, as "moitié illogiquement solitaire d'un droit plus étendu, le droit éducatif" (p. 6). Both De la Grasserie and Holbach are unaware of the existence of Bentham's work—a typical example of the general lack of coordination in scholarship and of the resulting waste of efforts. Cf. further: L. Jiménez Asúa, "La recompensa como prevención general: El derecho premial," *Revista general de legislación y jurisprudencia,* CXXV (Madrid, 1914), 5-30, 353-94; Dorado Montero, "Del derecho premial," in his posthumous book, *Naturaleza y función del derecho* (Madrid, 1927), pp. 163-75; De Mattia, "Merito e ricompensa," *Rivista internazionale di Filosofia del diritto,* XVII (1937), 608-24; Garilli, *Il concetto della sanzione* (2. ed., Palermo, 1938), pp. 91ff. Among others, Bernardis, *Del sentimento di giustizia* (repr. from the *Rivista militare italiana,* Rome, 1912), pp. 8ff., points to the efficiency of praise as an "act of justice." The idea of a "remunerative law" has also been accepted by Enrico Ferri, *Sociologia criminale* (5. ed., Turin, 1929-30), II, 119; whereas A. Pagano, *Studi filosofico-giuridici,* II (Modena, 1931), 177, rejects it without, however, studying the concept in detail.

[34] *Republic,* 3.21, 415a-c; 6.1, 484b; 7.15, 535a; cf. also *Laws,* 4.7, 715c; 6.5, 757c.

[35] *Nicom. Ethics,* 5.5 (2), 1130b; 6 (3), 1131a; cf. 3.7 (5), 1113b; 8.16 (14), 1163b; *Politics,* 3.5 (9), 1281a; 3.8 (13), 1283a; 12 (18), 1288a; etc.

reaction against the wicked. Laws, in general, are silent about this matter, or prescribe only certain generic requirements, always leaving an ample margin for the discretionary judgment of those who have the charge of making the selection.[36] Therefore, this selection depends almost completely on the intrinsic rightness of both the individual and the social conscience; the latter being reflected in public opinion and morals.

Wherever this rightness is lacking, remunerative justice, besides having almost no set forms, that is, besides being formally inorganic, also substantially falls short of its function. We may go farther and state that no kind of justice whatsoever can be truly realized if the moral sense becomes distorted or debased, that is, when selfishness, cunning, and violence become a common practice and easily find acquiescence and approbation to the same, or even a higher degree than charity, honesty, and wisdom. Where this happens, law would be of little avail. In a society of corrupt morals, laws would be badly applied, even if they were just; vices and perversions would under such circumstances find expression even in the laws.

Justice, in every one of its forms, and in its fundamental principle, is—it must be remembered—a part of Ethics; and only in harmony with Ethics in general can it really have a full and concrete existence.

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[36] Cf. Bentham, *op. cit.*, II.1.12: "Le domaine de la récompense est le dernier asile où s'est retranché le pouvoir arbitraire" (p. 155).

Notes and Reviews

ROMAN LAW ANTECEDENTS OF CANON 209 OF THE CODE OF CANON LAW

At the International Juridical Congress, held in Rome in 1934, Charles Boucaud pointed to the terminology of many of the canons of *The Code of Canon Law* as indicative of their relation to Roman law. In the case of canon 209, providing for the Church's supplying of jurisdiction in situations in which it is otherwise lacking, he saw a relation that amounts to a direct inheritance.[1] Not a few other present-day commentators have also noted the influence of the Digest[2] on the development of this principle by the canonists and its ultimate adoption by *The Code of Canon Law*.[3]

The source in the Digest upon which this legislation is thus considered to depend is sometimes known as the *Lex Barbarius*. It consisted of the solution of a problem that seems to have arisen during the late republican period about 50 B.C.[4] The principle enunciated in the solution, "error communis facit ius," is found also in other references to the *Corpus Iuris Civilis*,[5] notably in an instance in which a slave, appointed an arbiter by a magistrate, proceeded to pronounce a sentence that was accepted as a valid one because, at the time he passed sentence, he was commonly con-

[1] "Relationes inter Ius Romanum et Codicem Benedicti XV," *Acta Congressus Iuridici Internationalis* (Romae: Apud Custodiam Librariam Ponttificii Instituti Utriusque Iuris, 1937), IV, 48.

[2] D. (1.14) 3.

[3] Cf. Coronata, *Institutiones iuris canonici* (4 vols., Taurini: Marietti, 1933-1939), I, p. 339, note 6; Wernz-Vidal, *Ius Canonicum* (7 tom. in 8 vols., Romae: Apud Aedes Universitatis Gregorianae, 1923-1938), II, n. 381, note 5; Maroto, *Institutiones iuris canonici ad normam novi Codicis* (3. ed., 2 vols., Romae: Apud Commentarium pro Religiosis, 1921), I, 731; Chelodi, *Ius de Personis* (2. ed., Tridenti, 1927), n. 130. For a detailed study, see especially F. A. Wilches, *De errore communi in iure romano et canonico* (Romae: Apud Pont. Athenaeum Antonianum, 1940).

[4] Cf. G. Lopez, in E. Otto, *Thesaurus Iuris Romani*, III (Basileae, 1744), 442; Wilches, *op. cit.*, pp. 40-42.

[5] Cf., e.g., Inst. (2.10); C. (6.23) 1; C. (7.45) 2; D. (14.6) 3; N. (44.1) 1-4.

sidered to be a free man.[6] The *Lex Barbarius* involved a situation very similar to that just noted. Here also a slave succeeded in obtaining an appointment to a public office. Ultimately his true condition was revealed and the perplexing question of the validity of the acts performed while he was thought to be a free man came up for scrutiny. The passage of the Digest in which is narrated the solution of the difficulty prescinds from the authority of previously enacted general or specific statute law. On the other hand, it does not manifest too clearly the reasons on the basis of which the acts of the praetor-slave were held to be valid. This can be readily appreciated from even a casual glance at the text of the narrative as it stands in the Digest. It reads as follows:

> *Ulpianus libro trigensimo octavo ad Sabinum.* Barbarius [Barbatius] Philippus cum servus fugitivus esset, Romae praeturam petiit et praetor designatus est. sed nihil ei servitutem obstetisse ait Pomponius, quasi praetor non fuerit: atquin verum est praetura eum functum. et tamen videamus: si servus quamdiu latuit, dignitate praetoria functus sit, quid dicemus? quae edixit, quae decrevit, nullius fore momenti? an fore propter utilitatem eorum, qui apud eum egerunt, vel lege, vel 'quo alio iure'? et verum puto nihil eorum reprobari: 'Hoc enim humanius est': cum etiam potuit populus Romanus servo decernere hanc potestatem, sed et si scisset servum esse, liberum effecisset. quod ius multo magis in imperatore observandum est.[7]

In thus expressing his conviction that the acts of the praetor-slave were valid, as long as his condition was concealed from the populace, Ulpian quite clearly did not intend to imply that his own authority conferred validity on the acts involved. Indeed, he does not point to any existing tribunal as enjoying the authority to confer this validity. He seems rather to rely upon a traditional policy in virtue of which validity was conferred on acts such as these which would under ordinary conditions be invalid.

The foundation on which this policy was grounded finds itself implicitly manifested in the statement drafted by Ulpian who, in referring to the view of Pomponius, suggested the reason under-

[6] C. (7.45) 2.

[7] Critical analysis of this text reveals that two expressions have been interpolated, possibly as the result of the Christian influence which had become very strong by the time of Justinian; these expressions are: "quo alio iure" and "hoc enim humanius est". References in *Index Interpolationum,* I (1929), 12 *ad loc.*

lying the latter's decision. The brief notice he gives this decision can conceivably lead one to conclude that he did not wholeheartedly accept the reason on which it was based. But he does point to it, describing it as being an acceptance of the validity, not merely of the acts of the praetor, but also of his appointment as such.

This reason was seized in the Middle Ages by the *casus* of Vivianus (incorporated in the printed editions of the *Glossa ordinaria*) which amplified it in the following language:

> Tria dicit haec lex. Pone: quidam Barbarius nomine, servus erat: fugit a domino suo, et Romam ivit, et praeturam petiit, et praetor est factus. Hic tria quaeruntur, an fu<er>it praetor? et respondet quod sic, ibi *sed nihil etc.* Item quaeritur an fuerit liber? et ad hoc non respondet, sed dicit quod Romanus populus potuit servum liberum facere: et ex hoc colligitur populum tacite voluisse eum liberum esse, et sic liber fuit, et multo magis potuisset Imperator.

It is apparent from this argumentation that the latter portion of Ulpian's own statement serves as a basis for the elaboration of the view that the appointment itself was valid, since by a tacit dispensation the impediment of slavery was removed by the Roman people and thus was removed the only disqualification that would have rendered the appointment invalid. But Vivianus concluded from what the people would have done, if they had had knowledge, to what they actually did in ignorance.

Baldus (d. 1400), reviewing the attitudes affecting this argument on the part of the jurisconsults who devoted themselves to the study of Roman law after its revival in the eleventh century, definitely intimated that this view of Vivianus remained in favor. On the other hand, it did not seem acceptable to him and he criticized it chiefly because of the objection arising from the fact that if a tacit dispensation could be presumed, the slave would have been praetor and there would have been no solid reason for questioning the validity of his acts.[8]

The interpolations, " quo alio iure " and " Hoc enim humanius est ", prescinding from the granting of a dispensation and assuming

[8] Bartolus, *Omnia quae extant opera* (Venetiis, 1590), ad D. (1.14) 3, *repetitio*, n. 6. This commentary is ascribed to Baldus (d. 1400) at the very beginning of the *repetitio* itself.

a direct concession of authority to the praetor-slave for the period during which the populace was unaware of his condition, explained that equity demanded such a delegation of power. It is not to be concluded that this explanation was unknown to the jurists who lived before the era of Justinian. The notion of equity had long been a potent influence in the administration of justice under the Roman law. The adaptation of positive precepts among themselves and the anchoring of them to an unchangeable verity was accomplished by the thinking of the Greeks. This Greek concept of a law behind positive law was accorded a ready welcome by Rome and there is much in the *ius honorarium* that gives eloquent testimony to the remarkable extent to which its theoretical postulates were given practical application.[9] The Roman concept of the law behind the positive law may at times appear as rather narrow, as in the case of Modestinus, a contemporary of Ulpian, who seems to have thought of it only in the terms of the interests of the people, when he insisted that positive law should never be subjected to that interpretation which, literal though it might be, would defeat the "interests of men" to serve which the law itself, in virtue of an essential purpose, was enacted.[10]

But this view gave due recognition to the purpose without which a positive law can indeed not be regarded as a law at all, the purpose fundamental to all human law, the promotion of the common welfare. This purpose, suggested by the interpolations reported above, was accepted by the commentators of the fourteenth century as supplying the reason for the decision that the acts of the praetor-slave were valid. Lest this purpose be defeated it was necessary that the praetor-slave be accredited with *de facto,* not *de iure,* authority.

Since this underlying reason characterizes every system of positive law, it would not be surprising to find analogous delegation of

[9] Cf. Roscoe Pound, "The Idea of Law," *Jubilee Law Lectures* (The Catholic University of America, School of Law, Washington, D. C., 1939), pp. 72-97, at p. 73; Schulz, *History of Roman Legal Science* (Oxford: Clarendon Press, 1946), pt. II: "The Hellenistic Period of Roman Jurisprudence," *passim.*

[10] D. (1.3) 25: "Nulla iuris ratio aut aequitatis benignitas patitur, ut quae salubriter pro utilitate hominum introducuntur, ea nos duriore interpretatione contra ipsorum commodum producamus ad severitatem." Schulz, *op. cit.,* p. 241, note 5, taxes the passage with "rhetorical pompousness." (?)

jurisdiction in systems other than that of Roman law. Whatever the origin of the interpolations inserted in Ulpian's fragment—and they may well represent the entrance of Christian equity into a previously naturalistic jurisprudence [11]—it can scarcely be doubted that canonists, even in the absence of the *Lex Barbarius,* would readily have found their way to an application of the equitable principle which it proposed. On the other hand, an almost literal dependence on the *Lex Barbarius* is discernible in a dictum of Gratian, *magister* in the School of Bologna, whose prominent role in employing the revived study of Roman law for the elaboration of canonical doctrine is scarcely open to question.[12] This dictum occurs in his *Concordia discordantium canonum,* which he finished in or shortly after the year 1140, and follows upon a legal rule declaring that infamy excluded a person from the performance of certain acts of a public or jurisdictional character.[13] The dictum is appended in the following language:

> Tria sunt quibus aliqui impediuntur ne iudices fiant: Natura, ut surdus, mutus, et perpetuo furiosus, et impubes, quia iudicio carent. Lege, qui senatu motus est. Moribus, feminae et servi, non quia non habent iudicium, sed quia receptum est ut civilibus non fungantur officiis.[14]

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[11] Cf. C. Hohenlohe, *Einfluss des Christentums auf das Corpus iuris civilis* (Wien: Hölder, Pichler, Tempsky, 1937), pp. 130, 131; Riccobono, "Cristianesimo e diritto privato"—*Rivista di diritto civile,* III (1911), 37ff.

[12] It is quite another question, but of no immediate concern to the present discussion, whether all of Gratian's quotations from Roman law belonged to the original draft of his work; cf. Vetulani, "Gratien et le droit romain," *Revue historique de droit français et étranger,* (4) XXIV (1946), 11-48; *id.,* in *Apollinaris,* XXI (1948), 129-34.

[13] C. 1, C. III, q. 7.

[14] This portion of the dictum bears a marked similarity to D. (5.1) 12, which reads as follows: "*Paulus libro septimo decimo ad edictum.* Cum praetor unum ex pluribus iudicare vetat, ceteris committere id videtur. Iudicem dare possunt, quibus hoc lege vel constitutione vel senatus consulto conceditur. lege, sicut proconsuli. is quoque cui mandata est iurisdictio iudicem dare potest: ut sunt legati proconsulum. item hi quibus more concessum est propter vim imperii, sicut praefectus urbi ceterique Romae magistratus. Non autem omnes iudices dari possunt ab iis qui iudicis dandi ius habet: quidam enim lege impediuntur ne iudices sint, quidam natura, quidam moribus. natura ut surdus, mutus: et perpetuo furiosus et impubes, quia iudicio carent. lege impeditur, qui senatu motus est. moribus feminae et servi, non quia non

> Verum, si servus, dum putaretur liber, ex delegatione sententiam dixit, quamvis postea in servitute depulsus sit, sententia ab eo dicta rei iudicatae firmitatem tenet.

It does not appear with certainty to what extent Gratian intended his adoption of the principle to apply in the canon law system; indeed, its application in any case was thereafter justifiable only on the authority of Gratian himself, since the dictum was a private view appended to his transcription of an ecclesiastical norm. Both those writers who agreed with Gratian on its applicability and those who disagreed with him could point to ecclesiastical norms on which to rest their case.[15] Moreover, there seems to have been general agreement that the principle was not applicable to the acts of an excommunicated person.

This view was maintained by some even after Bernard of Parma (d. 1266), interpreting a decretal of Pope Innocent III (1198-1216), stated that the inapplicability of the principle was restricted to the

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habent iudicium, sed quia receptum est, ut civilibus officiis non fungantur. Qui possunt esse iudices, nihil interest in potestate an sui iuris sint."

This acceptance of the principles of Roman law as an auxiliary source of norms in the canon law system was subsequently given an endorsement of prime importance in c. 1, X, *de novi operis nuntiatione,* V, 32, a decision of Pope Lucius III (1181-1185) authorizing the application of Roman law in the following language: "Quia vero, sicut leges non dedignantur sacros canones imitari, ita et sacrorum statuta canonum principum constitutionibus adiuvantur . . . mandamus, quatenus diligenter considerans, quod post denunciationem novi operis, sive iure sive iniuria aliquid construatur, legalibus debet constitutionibus demoliri: et quia nulla ecclesia in praeiudicium est alterius construenda, negotium ipsum secundum legum et canonum statuta non differas terminare." The *Glossa ordinaria* makes the following comment on this decision: ". . . in causa ecclesiastica leges possumus allegare ut, etiamsi canones deficiant, possit iudicari secundum leges".

This very decision of Pope Lucius III was adduced by St. Alphonsus Liguori (d. 1787) asserting the validity in canon law of the principle of the *Lex Barbarius—Opera moralia Sancti Alphonsi Mariae de Liguori* (ed. nova, Romae: ex Typographia Vaticana a P. Leonardo Gaudé, 1905-1912), Tom. III, lib. VI, n. 572.

[15] Those agreeing could refer to c. 108, C. I, q. 1; c. 19, X, *de iure patronatus,* III, 38; c. 2, X, *qui filii sint legitimi,* IV, 17. Those in disagreement, to: c. 4, C. XXIX, q. 2; c. 4, D. VIII. Among those disagreeing was the glossator Ioannes Teutonicus (d. 1245), who said, "Vel dic (quod verius credo) quod nec sententia servi teneret, nisi confirmata esset a principe"—*Glossa,* ad dict., p. c. 1, C. III, q. 7, v. *dum putaretur.*

case of one who was publicly excommunicated,[16] an assertion that was not out of harmony with the commentary of Pope Innocent IV (1243-1254).[17]

But the controversy lost all cogency after the Council of Constance (1414), since, in virtue of the constitution of Martin V (1417-1431) entitled *Ad vitanda*,[18] the faithful were no longer bound to avoid excommunicated persons, unless and until their excommunication had been publicly proclaimed or expressly declared by an ecclesiastical court or unless it was a notorious attack on a cleric that caused their excommunication.

Other grounds of controversy appeared among the canonists in the course of the development of the principle as it applied to the system of canon law; such as the necessity of a title in the one invalidly exercising jurisdiction; the necessity of ordinary power, to the exclusion of delegated power, as a foundation for the acts placed in unwarranted reliance upon it; and the extension of the principle to the internal forum. Moreover, the question of what constituted common error was subject to much controversy. The sixteenth century was the period in which the principle was extended to cases of probable jurisdiction, at first as a result of regarding such cases as if common error existed in respect to the jurisdiction involved. In any event, the practical canonical force of the principle rested, prior to the Code, not on any specific legal enactment, but upon the application of the doctrine developed by

[16] *Glossa,* ad c. 24, X, *de sententia et re iudicata,* II, 27, v. *innodatus*: ". . . aliud si occulte: quia tunc nec ipse nec alii ipsum tenebantur vitare: quia divinare non poterant . . . unde cum communi opinione liber et absolutus habeatur et credatur, quicquid interim facit, valet."

[17] Ad c. 35, X, *de sententia excommunicationis,* V, 39, n. 3: "Item dum tolerantur in aliqua dignitate et sunt occulti, non nominatim excommunicati, satis videtur quod possint excommunicare, beneficia conferre, litteras impetrare, quia haec ipsa dignitas facere videtur et non persona excommunicata."

The case of the excommunicate was subsequently subjected to a further distinction on the part of canonists who were unwilling to accept the view of Bernard in its entirety. However, overwhelming opposition met their attempt to restrict the application of the principle to the acts of one who became excommunicate only after he had gained the office involved—cf. Sanchez, *De Sancto Matrimonii Sacramento Disputationum Libri Tres* (Lugduni, 1669), Tom. I, lib. III, disp. 22, n. 30.

[18] *Fontes,* n. 45.

the canonists and upon the legal custom resulting from that application.

The centuries of discussion and the powerful influence of legal custom prompted the ecclesiastical legislator to give explicit recognition to the equitable principle that undoubtedly found application in the *Lex Barbarius*. It is this Roman application of it, as well as the labors of the canonists who developed it, that adds an unmistakable lustre to the simple language in which canon 209 enunciates the principle, stating:

> In errore communi aut in dubio positivo et probabili sive iuris sive facti, iurisdictionem supplet Ecclesia pro foro tum externo tum interno.

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THE BARCELONA EDITION OF ST. RAYMOND'S FIRST TREATISE ON CANON LAW

There can be little doubt that the editing of medieval texts is one of the most urgent needs of present-day scholarship in canon law. The vast literary production of the classical age of canon law, from the twelfth to the fourteenth century, is for its major part inaccessible to the modern canonist, that is, accessible only to a handful of specialists who have devoted themselves to the painstaking study of manuscripts and are familiar with the intricate problems of paleography, textual criticism, and source history, which must be mastered before we can recover the treasures of medieval canonical thought.

Although our knowledge of the writings of decretists and decretalists has been greatly enlarged since the days of Maassen and Schulte, the output of modern editions is disappointingly small. Except for some writings on procedure incorporated in Wahrmund's *Quellen zur Geschichte des römisch-kanonischen Processes im Mittelalter* (5 vols., 1905-31), no critical edition of a major medieval treatise has appeared since H. Singer published in 1905 his excellent *Summa decretorum des Magister Rufinus*. It is therefore welcome news that in recent years the University of Barcelona has decided

to sponsor an edition of the *Opera omnia* of St. Raymond of Penyafort,[1] who, if perhaps not one of the most original, was certainly one of the most influential canonists of his age. His fame rests, first, on his work as compiler of the Decretals of Gregory IX, and, secondly, on his *Summa de casibus* (*Summa de poenitentia*), which was to secure for centuries St. Raymond's renown as a leading authority on the jurisprudence of the internal forum. Composed originally in three books, at Barcelona between 1222 and 1229, the work was reissued by the author after the promulgation of the Decretals, probably in 1235, when he was a papal *capellanus poenitentiarius*, with the addition of a fourth book, on marriage, which actually is but a revised copy of Tancred's popular *Summa de matrimonio* (*c.* 1214).[2] The immense success of the *Summa de casibus*—commonly known in the Middle Ages simply as *Summa Raymundi*—is attested by the hundreds of manuscripts still extant; it was first printed in 1603 (Rome, Tallini) shortly after Raymond's canonization (the alleged incunabula of 1480 and 1500 contain in reality a late medieval epitome of the work)[3] and has been reprinted several times in the seventeenth and eighteenth centuries.

Raymond's further literary production includes a revision of the Constitutions of the Dominican Order, of which he was General from 1239 to 1240, as well as some letters and canonical opinions;[4] and modern research, while declaring spurious a number of other writings that went under his name among earlier bibliographers,[5]

[1] *Sancti Raymundi de Penyafort Opera omnia,* Vol. I: San Raimundo de Penyafort, *Summa iuris.* Edición de Mons. José Rius Serra. Barcelona: Universidad de Barcelona, Faculdad de Derecho, 1945. (Half-title: Colección de Textos y Estudios de Historia jurídica). 153 pp., 1 plate.

[2] Cf. Kuttner, *Repertorium der Kanonistik (1140-1243)* (Città del Vaticano, 1937), pp. 443-5; A. Van Hove, *Prolegomena* (Commentarium Lovaniense in Codicem iuris canonici, I, 1; 2nd ed., Malines-Rome, 1945), p. 513f., with further bibliographical references.

[3] Cf. *Repertorium,* p. 443, n. 4.

[4] *Ibid.,* p. 448. Of the written opinions, one has the character of a short treatise, beg. "Credo quod deprehensi in heresi"; printed, e.g. in the edition Verona, 1744, of the *Summa,* pp. liv-lv and in *Raymundiana,* ed. Balme, Paban, and Collomb (Monumenta Ordinis fratrum praedicatorum historica, VI; Rome, 1898-1901), II, 41f.

[5] *Repertorium,* p. 449. One of these, the *Summa pastoralis* of Laon, MS 157, has been edited by F. Ravaisson in an appendix of his catalogue of the

has brought to light some minor, genuine works which illustrate significantly the career of the saintly jurist.[6] Two of these, belonging to his later years, show all the practical experience and concern of the papal *poenitentiarius* with cases of conscience: the so-called *Dubitabilia cum responsionibus* (also known as *Responsa canonica*) of January 19, 1235,[7] and an abstract made from the official collection of Decretals for the use of confessors. Of even greater interest are the early glosses on the *Decretum*[8] and the *Summa iuris canonici* which Raymond wrote during the brief period of his professorship in Bologna, 1218-1221, before he entered the Order of St. Dominic.

To these writings we may add a commentary, not mentioned heretofore, on the *Arbores consanguinitatis et affinitatis*, which still needs further investigation. It begins: "Quia tractare intendimus . . ."; of its second part, on affinity, two variants appear to be extant, beginning "Cum intendamus tractare . . ." and "Affinitas est proximitas . . ." respectively.[9] The latter version, in turn, has

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Municipal Library of Laon, *Catalogue général des manuscrits des bibliothèques publiques des départements de France,* (4°) I (Paris, 1849), 592-649. The false attribution of this work, which deals with the office of the archdeacon and was written for the use of the diocese of Paris, goes back to Père Laget (*Mémoires de Trévoux,* 1717, as cited by Ravaisson, p. 119), the scholar to whom we owe the Lyons edition of 1718 of Raymond's *Summa de casibus* (reprinted Paris, 1720 and Verona, 1744).

[6] Cf. *Repertorium,* pp. 438-42, 446-8. The article by E. Gomez, "Un comentario inédito a las Decretales de San Raimundo de Peñafort," *Boletín Eclesiástico de Manila,* XIII (1935), 21ff. (cited questioningly, *loc. cit.,* p. 448) does not deal with a treatise of St. Raymond but with an early modern commentary, by J. Fuixd, Rector of the University of Santo Tomás, on the Decretals.

[7] For manuscripts, editions, and date, see *Repertorium,* p. 446f.; add MS 100, fol. 42v-45v of the Seminary of Pisa, with the same date as the Oxford MS.

[8] *Ibid.,* pp. 102, 442. Add Paris, MS lat. 3903 (already suggested, *ibid.,* p. 101; collations I made in 1938 have borne out this assumption). It is not impossible that Raymond also wrote glosses on the *Compilatio IV,* but the siglum *R.* which appears in a set of glosses on this compilation in Admont, MS 22, cannot as yet be interpreted with certainty; cf. Kuttner, "Johannes Teutonicus, das vierte Laterankonzil und die Compilatio quarta," *Miscellanea Giovanni Mercati* (Città del Vaticano, 1946), V, 624, n. 8.

[9] I have seen only Piacenza, Cathedral Chapter, MS 59 (91), offering the first, and Vienna, National Library, MS lat. 2056, fol. 301-302r, offering the second variant. The MSS are inscribed as "magistri Raimundi" and "secun-

not yet been examined as to its identity with a gloss on the *arbor affinitatis* found in a codex of Gratian at Vercelli, Cathedral Chapter, MS xxv, which begins "Affinitas est propinquitas . . ." and ends with the curious signature, "Raymundus ultramuntanus qui fuit doctor istarum decretalium, i.e. omnium scripturarum."[10] One

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dum fratrem Reimundum" respectively. Other copies seem to be fairly numerous, to judge from printed catalogues: e.g., Danzig, Stadtbibliothek, MS 1861 (XVIII.D.f.6); Königsberg, University, MS 55 (XLIV), fol. 139v-144r; MS 173, I (XIII), fol. 177v-178r; MS 182 (XVI: "secundum ffratrem reimundum"), fol. 257r-258v, all of which offer var. 2. In some other cases, the catalogues do not give the *initium* for the *arb. affin.*, e.g. Troyes, MS 1244; Escorial MSS V.I.2, fol. 3v (Vincentius?); V.I.7; Barcelona, Archivo de la Corona de Aragon, MS Ripoll 7 (*arb. cons.* reproduced in Beer, *Sitzungsberichte der kais. Akademie der Wissenschaften*, CLVIII, ii [Vienna, 1908], pl. 9).

[10] The interesting twelfth-century glosses on Gratian in this MS (mostly erased to make room for the *Glossa ordinaria* of Bartholomaeus Brixiensis) are not to be discussed here; but it should be mentioned that the large pictures of the two *Arbores* are furnished each with two elaborate sets of glosses. (1) *Arbor affin.:* (set *a*) beg. "Ut si quid in pictura distinguitur . . ." (also found in MS 46 of the Chester Beatty collection, London; cf. E. G. Millar, *The Library of A. Chester Beatty*, II [Oxford, 1930], pl. cvii); (set *b*) beg. "Affinitas est propinquitas," by Raymundus Ultramuntanus, see above. (2) *Arbor consang.* (set *a*) beg. "Occasione capituli Ysidori qui gradus cognationis . . ." (also in Turin, MS D.IV.40, fol. 35vb-36rb, between pts. I and II of a copy of Stephen of Tournay's *Summa decretorum*); (set *b*) beg.: "Quoniam bone rei dare consultum . . . idcirco ego magister Iohannes yspanus, agitanensis canonicus, legum doctor, rogatu et precibus quorumdam . . ." (also in Oxford, Bodleian MS Rawlinson A. 384, fol. 90, according to the catalogue, where the name appears as Joh. Hisp. can. "egitani").

This Portuguese civilian, Canon of Idanha (*Egitanensis*), is unknown to historians of medieval legal science. Another work of his, being a commentary on Johannes Bassianus' *Arbor actionum*, has been wrongly listed by Savigny, *Geschichte des römischen Rechts im Mittelalter* (2nd ed., Heidelberg, 1834-51), V, 474f., and Schulte, *Geschichte der Quellen und Literatur des canonischen Rechts*, II (Stuttgart, 1877), 106, among the writings of his compatriot, the canonist Johannes de Deo. Obviously, both scholars were at a loss to explain the toponymic, *Egitanensis* (variously disfigured in the MSS as *egicanen., egyptanen., egaji*, etc.; cf. also the anonymous commentary on Johannes Bassianus' *Arb. act.* in Paris, MS lat. 4541, which cites our author as "Egiptonensis canonicus," Savigny, V, 474, note *a*). Still, it remains strange that they did not advert to the fact that the canonist always uses his full name, *Johannes de Deo hispanus*, always gives his degree as *decretorum doctor*, and his dignity, as *sacerdos* or (after 1243 A.D.) *canonicus Ulixponensis* (Lisbon).

will have to bear in mind that at the time when St. Raymond was still a student at Bologna (*c.* 1210-18), there existed another "magister Ramundus" in the same city: the two Raymonds appear, e.g., in a document of April 25, 1218.[11] For this reason one should also hesitate to form a definite opinion on the authorship of a (likewise hitherto unknown) *Summa metrica iuris,* transcribed on four inserted leaves at the end of the Vatican MS Ross. 595 of Gratian's work [12] (fol. 303-306r), which begins:

> Hos ego ramundus uersus tibi profero, lector.
> Set mihi non tribuas nisi quas "R" littera monstrat.
> Adicio reliquis rubrum notulasque probandi . . .

Only a careful collation of these rather pedestrian verses and their marginal *notulae probandi* (i.e., references to Gratian and the first four *Compilationes antiquae*) with St. Raymond's ascertained writings will show whether he or the other "Ramundus" is to be credited with this piece of didactic poetry. Finally, there exists a short treatise awaiting identification in Paris, Bibl. nat. MS lat. 12387, fol. 55v-(58?), inscribed according to the catalogue as *Tractatus fr. Raymundi de vii vitiis capitalibus*—: a genuine work or an abstract from the *Summa de casibus?*

In the first volume of the new Barcelona edition Msgr. José Rius Serra, well known to medievalists by his extensive work in archival materials relating to Catalonian history, has printed the *Summa iuris canonici* of 1218-21 from the only extant, fragmentary manuscript, cod. Borgh. 261, fol. 91-102v of the Vatican Library, which was discovered by that untiring savant, Heinrich Denifle, O.P., in the 'eighties of the last century. The slender volume contains eleven pages of Introduction (pp. 7-17); pp. 19-141 are given to St. Raymond's text; and pp. 143-53 contain excerpts from a collection of *quaestiones disputatae* which in the Borghese MS (fol. 103-110v) follow upon the *Summa.*

The editor's endeavors were rendered difficult by adverse external circumstances. From a brief statement at the end of the Introduc-

[11] Edited by F. Valls-Taberner, "Diplomatari de Sant Ramon de Penyafort," *Analecta sacra Tarraconensia,* V (1929), 253.

[12] For the various layers of glosses in this MS see *Repertorium,* p. 57f.; Kuttner, "Bernardus Compostellanus Antiquus," *Traditio,* I (1943), 285, n. 33; 286; 287, n. 45; 289, nn. 51, 52, 54.

tion (p. 17) we learn that the volume was all set up in type when the Spanish civil war broke out in 1936 and the printer's stock was destroyed in Barcelona. Only a set of galley proofs was saved, and from this the book was reconstructed without any changes—except for the addition of two bibliographical references [13] at the end of the preface—in 1945. This minor tragedy in the great tragedy of the civil war undoubtedly deserves our sympathy, but Msgr. Rius' decision to publish text and introduction from the nine-year old proof sheets, and thus to ignore the progress made by Raymundian scholarship after 1936, can only be regretted. The danger of any edition that passes over the valid results of contemporary research lies in the fact that it tends to perpetuate an antiquated state of knowledge. Now that the treatise is available in printed form, St. Raymond's *Summa iuris canonici* will probably not be edited again in this or the next generation, and the unsuspecting reader will be led to believe that he has now the best available information in his hands, which unfortunately is not the case. This reviewer therefore regrets that he cannot concur in the unreserved praise the publication has received in Spain.[14]

Since we have to do with a single manuscript, which—aside from its incompleteness—presents a fairly good reading, the task of the editor of the *Summa* was not hampered by the usual intricacies of textual criticism. On the whole, the text of cod. Borgh. has been faithfully reproduced, even to the extent that obvious scribal slips have often remained uncorrected.[15] On the few pages of the edition which I have collated line by line, I found only minor inaccuracies, some of which may be due to printer's errors.

[13] To the reviewer's *Repertorium* (1937) and to Valls-Taberner's *San Ramón de Penyafort* (Barcelona, 1936). Some other titles, such as A. Teetaert, "Raymond de Penyafort," *Dictionnaire de Théologie catholique,* XIII (1937), 1806-23; Gregorio M. Dénes, *I Notabili di Paolo Ungaro* (Rome, 1944: pp. 22-34, description of MS Borgh. 261), should have been added.

[14] R. Baucells Serra, "La personalidad y obra juridica de San Raimundo de Peñafort," *Revista española de derecho canónico,* I (1946), 7-47; G. Oesterle, *ibid.,* II (1947), 665-70.

[15] Cf. in the following example from the title *De lapsis,* lines 4, 33.

First paragraph of cod. Borgh. fol. 96v, as reproduced on the plate at the end of the volume, collated with ed. Rius (= *R*), p. 79, lines 13-38 (numbering of lines supplied):

17 Ista] Ita *R*
23 .lxxxvj. di. Non satis] di. Non satis *R*
24 officii d.lxxxviii] officii. I. d. lxxxviii *R* (obviously caused by the separation of the word "offici-i" in the MS)
30 Si nulla. §Item] Si nullas. Item *R*
32 est] esse *R* (the MS has "este", with the final *e* expunged)
35 extra .ii. c.licet] Extra .II. e. (de feriis) I. c. Licet *R*
36-7 de off. deleg.] de officio iudicis delegati *R*

Title *De lapsis* (2.27), ed. Kuttner, *Repertorium,* pp. 449-52 with lines numbered, collated with *R,* p. 100f.

3 de mo<nachis>] de modo *R*
4 Proclivis] Proclivus *R cum ms.*
ide<o>] Idem *R*
5 intelligas, nota] intelligas nota. *R* (punctuation makes no sense)
6 <tres regulas>] <regulas> *R* (the more correct substitution of two missing words results from line 7, and from the parallel text of *Sum. de cas.*)
9 .xxv.d. Primum] xxv. Primum *R*
d.L. Illud, i.q.vii. Si quis omnem] d.L. Illud, Si quis omnem; I. q.vii. *R*
13 Et iste] Iste *R*
33 mediocria] mediocra *R cum ms.*
58 c.I.] e.I. *R*

Raymond's scriptural quotations have been verified throughout, but of his hundreds of references to the sources of canon and civil law only a very small number (less than 10%) have been singled out, without any intelligible principle of selection, for verification. This method, or rather lack of method, is cumbersome for the reader and contrary to the accepted standards of editing juristic texts of the Middle Ages; moreover, in the few cases where the modern form of citation has been supplied, the frequent lack of precision is disappointing.

In the first of the two texts sampled above, we find e.g. (line 33-4): "C. de feriis: Omnes dies, et L. ultim. III., 12.67"; this should have been: "... et l. ult. (Cod. 3.12.*6 et 9*)."—In the second text, a few references have been identified, by way of exception, for line 35: "dist.L. Miror (c.4), I. q.I. Erga, Si quis neque (c.90, 95) ..."; actually, the last two canons are cc.110, 115.

Raymond often cites the opinions of other canonists, using the

conventional sigla for their names. Most of these have been correctly expanded by the editor, e.g., Io(annes), La(urentius), Vin(centius), though he fails to investigate whether Johannes Teutonicus or Johannes Galensis is referred to in the individual instances. But it is baffling, to say the least, when we see the abbreviation *h.*—which of course stands for the great Huguccio (d. 1210)—constantly misinterpreted as a reference to Hostiensis,[16] who flourished over a generation later than St. Raymond.

Notwithstanding these deficiencies, the text as printed by Msgr. Rius will be useful to the student of medieval jurisprudence. The same cannot be said, unfortunately, of his Introduction, which is the weakest part of the book and which would have gained considerably, had the editor not chosen to neglect the pertinent studies of other scholars. Besides, one is entitled to expect of such an introduction at least some discussion of the characteristics of the edited text; its form, method, merits; its relation to other writings of the same author as well as to works and doctrines of other contemporary writers, etc. This would have been particularly appropriate in the present instance, since the work of the young "Raimundus catalanus professor iuris canonici"—as he calls himself in the prologue—marks in several respects a departure from the style of Bolognese writing at the beginning of the thirteenth century. We learn from the prologue that the work was to comprise seven *particulae:*

> (i) Varie species et differentie iuris. (ii) De ministris canonum, differentiis et officiis eorumdem. (iii) De ordine iudiciario. (iv) De contractibus et rebus tam ecclesiarum quam clericorum. (v) De criminibus et penis. (vi) De sacramentis. (vii) De processione spiritus sancti.

Each of these is subdivided in a number of *tituli.* Only the first two parts are preserved in the Borghese manuscript, which breaks off in the last title of Part Two (2.39 *De maioritate et obedientia*).

The work, then, is neither a *Summa decretorum* nor a *Summa decretalium* in the conventional sense, but rather what we may call a *Speculum iuris canonici* (the unspecified designation as *Summa iuris* which has been chosen for it in the Barcelona edition is cer-

[16] E.g., pp. 51 (§ *In summa nota,* line 5), 63 (§ *Item numquid,* line 2), 64 (line 2), 89 (line 2 from bottom), 107 (§ *Hic tamen nota*), 110 (§ *Item numquid*), etc.

tainly inadequate): arranged in a system of its own, the treatise is only in part inspired by the sequence of topics as given in the sources, i.e., in Gratian and the *Compilationes antiquae* of decretals.[17] In each title Raymond proposes (1) to summarize the *materia rubricae,* (2) to present in brief and to solve some pertinent *quaestiones,* (3) to formulate some *notabilia* ("notule iuris ad rubricam pertinentes"), (4) to teach beginners ("rudes") by appropriate references how to find the subject matter under discussion "tam in textu quam in glosa" of both the Decretum and the Decretals.

It is interesting to note that St. Raymond later was to take over in his *Summa de casibus* much of the systematic arrangement as well as the *modus agendi* of the earlier treatise;[18] also in substance and wording, large portions of the later work can be characterized as but a slightly revised re-edition of the former.[19] Only this last point is briefly noted in Msgr. Rius' Introduction (pp. 14, 16), with the promise to discuss the matter at length in a future edition of the *Summa de casibus.* Still, it would have been advisable to include in the present volume at least a specimen of textual parallels and to point out, as could have easily been done, the corresponding sections of the *Summa de casibus* in a brief footnote at the beginning of each title in the *Summa iuris canonici.* But even the cursory remarks of the Introduction on the relation between the two works are not quite to the point: the editor speaks, e.g., of the affinity of our treatise with the *Summa de poenitentia* (*de casibus*) and *de matrimonio* (= *de cas.* Bk. IV), although in MS Borgh. the section on marriage, which would have been included in Pt. VI *De sacramentis,* is not preserved. When it is further assumed (p. 14) that the prologue of the *Summa de casibus* may contain, in the words ". . . ex diversis auctoritatibus *et maiorum meorum dictis* compilavi," an allusion to our treatise, this strange assumption can only be based on a grammatical misunderstanding ("my earlier dicta" for "the dicta of my predecessors"?).

Of paramount interest would have been a discussion of the relationship between the *Summa iuris canonici* and the glosses on

[17] For some details cf. *Repertorium,* p. 441. To my knowledge, general treatises of canon law which depart from the strict order of the sources are found prior to St. Raymond only in the French and English schools.

[18] Cf. the observations made in *Raymundiana* (note 4 *supra*), II, 6, n. 2; *Repertorium,* p. 442.

[19] Cf. the sample printed in *Repertorium,* pp. 449-52.

Gratian which Raymond wrote during his Bolognese period. The existence of these glosses, however, has been ignored by the editor as a consequence of his decision to by-pass information that has become available after 1936. Instead, unnecessary space has been given to the discussion—and the partial edition—of the *quaestiones disputatae* which are copied in MS Borgh. after the fragment of Raymond's work. There exists no intrinsic or extrinsic reason for which this collection of twenty-seven *quaestiones*, some of which are signed by *Io.* (Johannes Teutonicus?), should be connected with St. Raymond's teaching, even though the collection represents a *reportatio* of formal disputations held in the school of Bologna during the period of his professorship, i.e. about 1220.[20]

One has the impression that the editor could not quite make up his mind as to the *quaestiones*. We read on p. 10: "non constat nostrum Beatum fuisse auctorem"; p. 14: "textus noster ex duobus operibus coalescit." He goes on to say that he is editing some of the *quaestiones* (without indicating which ones he has selected)[21] in order that the reader may form his own judgment on the authorship; but in the footnote at the beginning of this edition (p. 143) he suggests that the author possibly was Damasus (why?), *probabiliter* not Raymond. Nonetheless he inscribes the *quaestiones*, on the same page, as *Tertia Pars* as though they were a continuation of Raymond, Pt. I and II; and in the Introduction (p. 14f.) he suggests the possibility that the *quaestiones* may be identical with the *Dubitabilia*, "[opus] editum a Von Schulte et catalogatum sub titulo 'Quaestiones de casibus' in bibliotheca Antonii Augustini."

It is not an easy task to disentangle the amount of misinformation telescoped in this one sentence. A single look at Schulte's edition of the *Dubitabilia* (but the reader is not told where to find it)[22] suffices to show that they have nothing in common with the

[20] For the criteria (not discussed by the editor) of establishing place and date of the *Quaestiones Borghesianae*, cf. *Repertorium*, p. 429f.; *Misc. Mercati* (note 8 *supra*), V, 628, n. 29. A collection in which a considerable number of the same *quaestiones* is reported exists in Padua, Bibl. Antoniana, MS III. 68. It consists of 58 qq., of which P(adua) 3 = B(orgh) 1, P6 = B4, P25-29 = B7, 8, 10, 18, 19, etc.

[21] They are qq. 1-4, 25. The beginning of q. 3 (p. 146) should read "Quidam dum fugaretur . . ." not "Quidam <ut> defugaretur . . .".

[22] Actually, we have two editions: Schulte, "Die canonistischen Handschriften . . . in Prag," *Abhandlungen der kgl. böhmischen Gesellschaft der Wissenschaften*[6], II, 2 (1868), 98-102; *Raymundiana* (note 4 *supra*), II, 29-37.

Quaestiones Borghesianae; also, the lost manuscript of Antonio Agustín (no. 312 of his library; later Escorial, MS VI.F.30 [33], destroyed in the fire of 1671 A.D.)[23] was listed in his catalogue as *Dubitabilia cum responsionibus ad quaedam capita missa ad Pontificem,* not as *Quaestiones de casibus.* The latter is actually the inscription of a certain collection of *quaestiones* which follows in Paris, MS lat. 16421, upon St. Raymond's *Summa de casibus* and of which Quétif and Echard, in their encyclopedia of writers of the Dominican Order (1719), guardedly but erroneously believed that it might contain the *Dubitabilia.*[24]

Other sections of the Introduction deal with the earlier bibliography on the *Summa iuris canonici,* with the provenance of cod. Borgh., with Raymond's use of the sources of canon law, with the approximate date of the work and of the extant copy. Nearly all of these observations stand in need of correction. Thus we read (p. 7) that Schulte was among the first scholars to publish information about the *Summa iuris canonici;* actually, however, he never knew the work: the pages referred to by Msgr. Rius in Schulte's *Geschichte der Quellen* deal with the *Summa de casibus,*[25] while the treatise of cod. Borgh. was not known before Denifle's discovery, first announced in 1885.[26]—Then, in attempting to trace back our manuscript to the Avignonese library of the popes—which, as we know from Cardinal Ehrle's researches, contained so many of the books that later turned up in the Borghese collection—Msgr. Rius thinks it probable, if I understand him aright,[27] that MS Borgh.

[23] P. G. Antolín, *Catálogo de los códices de la R. Bibl. del Escorial,* V (Madrid, 1923), 224, 445, cf. p. 331.

[24] Quétif-Echard, *Scriptores ordinis praedicatorum,* I, 109. Cf. *Repertorium,* p. 446.

[25] Schulte, *Geschichte der Quellen und Lit. des can. Rechts,* II, 410f., wrongly quoted also by Teetaert, "La Summa de poenitentia de s. Raymond de Penyafort," *Ephemerides theologicae Lovanienses,* V (1928), 56 and in *Dictionn. de Théol. cath.,* XIII, 1810.

[26] *Die Universitäten des Mittelalters bis 1400,* I (Berlin, 1885), 15, n. 76; cf. p. 739, n. 232.

[27] P. 8: ". . . codex Borgh. 261 bibliothecae Benedicti XIII, certo b. Raymundo attribui non potest, quamvis stemus pro probalitate [*sic*] talis filiationis." I take it from the context that Rius means to say: "codex Borgh. 261 b. Raymundi bibliothecae Benedicti XIII certo attribui non potest, quamvis . . .". Jarring misprints and careless Latin have also elsewhere remained

261 may be identical with no. 410, "Summa brevis extracta a summa Raymundi," of the library of Pedro de Luna, the anti-pope Benedict XIII. But among the many Raymundiana in this fourteenth-century book list (Rius refers to nos. 403, 404-7, 409-10, 419), this is certainly one of the least likely items: it must have been one of the many abbreviations of the *Summa de casibus*, which, as is well known, were among the most popular books of the later Middle Ages.

In the description of MS Borgh. 261 (pp. 8-11) a number of its miscellaneous items (to wit, those numbered *a, b, c, i*) have not been correctly determined: (*a*) the fragment fol. 1-19r belongs to the *Summa decretalium* of Damasus; (*b*) the *Quaestiones* of Damasus, fol. 19r-44r, begin "Queritur an episcopus canonem late sententie condere (not "concedere") possit"; (*c*) the same author's *Brocarda*, fol. 45r-52v, have never been printed: the editions cited by Msgr. Rius contain later redactions of the work, by Bartholomaeus Brixiensis and others; (*i*) the "diversi tractatus iuris identificatu difficiles," fol. 111-137, could have been specified.[28]

Speaking of the "modus allegandi fontes in nostro codice" (pp. 11-13, 16), the editor arrives at the astonishing conclusion that Raymond's method could be called *moderna*, on account of the "probationes ex tot tantisque fontibus haustae": we are told that Raymond either must have been endowed with an exceptional memory, or else must have devised for his source references a method of filing cards (*schedulae*) similar to the technique of today's scholars. Msgr. Rius seems unaware of the fact that the assembling of cross references stands historically at the beginning of all of the glossators' literary activities. Thousands of such references accompany the text of Code, Digest, Institutes, and the Decretum already in the early manuscripts of the twelfth century. They bespeak a degree of mastery of the sources which is unexcelled to the present day;[29] they were the basic tool of the medi-

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uncorrected throughout the "Praefatium" [*sic*], e.g. on the first page (p. 7): "Denique . . . nobis commissit laborem et non [=nos] . . . curavimus."

[28] Cf. *Repertorium*, pp. 394, 426-8, 420-2; 237, 410, 437, n. 2; Dénes, *op. cit.* (note 13 *supra*), pp. 25-8.

[29] Cf. E. Genzmer, "Die justinianische Kodifikation und die Glossatoren," *Atti del Congresso internazionale di diritto romano, Bologna*, I (Pavia, 1934), 392.

eval jurist in interpreting the texts and in developing legal and canonical doctrine. St. Raymond would not have been worth his salt if he had not been thoroughly familiar, like every other student of canon law, with the *concordantiae* and *contraria* at his disposal in the several standard *apparatus* of glosses, on Gratian as well as on the compilations of decretals, that were used in the schools of his time.

These compilations—the first four of the so-called *quinque Compilationes antiquae*—are somewhat inaccurately described by the editor (p. 12). It is not correct to say, e.g., that the *Compilatio I* (*c.* 1188-92) contains only decretals prior to Clement III, since it does contain not only some decretals of this pope (1187-91), but also a large number of pre-Gratian texts which are not decretals at all. Nor is the *Compilatio II* composed entirely of letters of Clement III and Celestine III (more than one third belongs to earlier popes, especially Alexander III and Lucius III); the name of Innocent III's notary who compiled the official *Compilatio III* is Petrus Collivaccinus (not Collivicinus); and the *Compilatio IV* contains not only the canons of the IV Lateran Council and decretals of Innocent III issued after his twelfth year (1209/10), but also 44 decretals from this pope's earlier years. It is difficult to see why Msgr. Rius labels this collection as "vix in codice nostro allegata" (pp. 12, 15): on the contrary, St. Raymond was one of the first Bolognese authors to make consistent use of it.[30] Finally, the editor states correctly that Honorius III's official *Compilatio V* (issued on May 2, 1226) is never cited by Raymond; but he passes over in silence the fact Raymond refers to some individual statutes and decretals of this pope as *extra titulos,* although this point[31] is of great importance for establishing the proper date of the *Summa iuris canonici.*

Mandonnet[32] has definitely shown that the period of St. Raymond's teaching at Bologna covers the years from May, 1218, to the end of 1221. Within this brief span, Msgr. Rius argues (p. 15),

[30] *Misc. Mercati* (note 8 *supra*), V, 628; on the composition of *Comp. IV,* see *ibid.,* pp. 617-22. Compare, e.g., Raymond's *Sum. iur. can.* 2.1-2: pp. 49 (§ *Solus dispensat ut aliquis*), 51 (§ *De officio*), 52 (§ *Officium*), 53 (line 1); *ibid.,* 2.6: pp. 60 (line 3 from bottom), 63 (line 2 bott.), 64 (line 3 before *tit.* 7), etc.

[31] Not noticed in *Repertorium,* p. 440.

[32] "La carrière scolaire de saint Raymond de Peñafort," *Analecta sacri Ordinis fratrum praedicatorum,* XIV (1920), 278f.

we should take the middle ("mediam insequentes viam") and assign the work to the years 1219 or 1220. A strange argument indeed; and five lines further down we read ". . . confectam fuisse 1218-19." As a matter of fact, St. Raymond cites the following texts of Honorius III:

p. 49: ". . . (papa) solus dispensat ut aliquis habeat plura beneficia . . . Extra. iiii. de prebend. const. De multa [this is *4 Comp.* 3.2.4] et extra t<itulos> Expectantes." This is the letter *Expectavimus hactenus expectantes,* addressed on November 19, 1219 to the bishops and clergy of Ireland and, four days later, to the Patriarch of Antioch, the Swedish bishops, etc. (Pressutti 2268; Potthast 6163, 6166). The lengthy encyclical (full text in Mansi, XXII, 1098-1100) was privately copied by canonists; thus in an appendix to *Comp. IV* in Bamberg, MS Can. 19 (P.II.6), fol. 255rb-255vb, and in an appendix to *IV Conc. Lat.* in Vienna, MS lat. 2183, fol. 106-108. The final portion of the letter (beg. "Sane cum olim vas . . ."; Mansi, XXII, 1100 B11-E) was incorporated in *5 Comp.* 3.24.1 and, abridged, in X, 3.41.10. Raymond, however, has in mind another passage: ". . . nec quemquam permittatis habere plures personatus . . . nisi forsan super hoc habeat indulgentiam sedis apostolicae specialem" (*ibid.* 1100 A15-B5).

p. 67: ". . . et in constit. Honorii Super specula." This is the famous statute of November 22, 1219, which restricted the study of Roman Law and closed down the civil law school of Paris (Pressutti 2267; Potth. 6165).

p. 117: ". . . licet non esset processum ad sollempnitatem electionis, posset petita et recepta postulatione petere consecrationem, arg. preallegati capituli . . . sed hoc non placet per decretalem extra tit. Rothomagensi." This is the decretal *Ecclesia vestra* (X, 1.6.48) addressed to the Chapter of Rouen, and elsewhere transcribed with the initial variant *Ecclesia Rothomagensi* (e.g., in the above-mentioned appendix of MS Bamb. Can. 19; in the short collection of Lisbon, Bibl. Nacional, MS Alcob. 381, fol. 224r-v). The decretal, recorded in Potthast 6848 for the year 1222, is dated in the papal register: December 1, 1221 (Pressutti 3591).

The extant portions of Raymond's work, then, cannot have been finished before December, 1221, and in this respect it becomes a matter of particular interest that no other manuscript of it has ever come to light or even been mentioned in medieval catalogues,[33] and

[33] Medieval lists of Dominican writers in which the *Summa iuris* of St. Raymond is recorded, always have in mind the *Summa de casibus;* cf., e.g., the one published by A. Auer, *Ein neuaufgefundener Katalog der Dominikanerschriftsteller* (Institutum Historicum frat. Praed., Dissertationes his-

that it was unknown even to the earliest biographers of the Saint. These telling facts cannot be explained away by simply assuming (Rius, p. 15) that "eius doctrina in hac ultima Summa (i.e., *Sum. de cas.*) ampliata fuisset" (how do we know this? the complete *Summa de iure canonico* would have covered a much wider ground than the *Summa de casibus*). One might rather ask whether St. Raymond did complete his first *Summa* at all before returning to his native Catalonia.

St. Raymond is found as an appointed arbitrator awarding a judgment in the Cathedral Chapter of Barcelona on March 14, 1222;[34] less than three weeks later he entered the Order of Preachers. The day is given as ". . . anno Domini MCCXXII in die Parasceves" in the obituary of St. Catherine's Convent, Barcelona.[35] Whether we understand MCCXXII in the style of Circumcision or of Annunciation, the date can be read only as April 1, 1222; for in 1223 Good Friday fell on April 21, i.e., beyond the year of Annunciation 1222 (March 25, 1222—March 24, 1223). This reckoning, incidentally, would seem to eliminate the possibility of reading the Chapter's document of March 14, 1222, in the style of Annunciation, as was proposed by the late Dr. Valls-Taberner,[36] i.e., as, March 14, 1223; or else, if the latter date is to be postulated on diplomatic grounds, *magister Raimundus de Pennaforti* must have been called from St. Catherine's to arbitrate the dispute in the Chapter as an outsider.[37] In this connection, it should be noted that Msgr. Rius elsewhere, and for other reasons, has voiced objections against the traditional view that St. Raymond was a Canon of Barcelona Cathedral before he became a friar.[38]

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toricae, II; Paris, 1933), pp. 95-6: ". . . summam iuris que suo nomine vocatur 'Summa Raymundi' . . ."; cf. also H. D. Simonin, in *Archivum fratrum Praedicatorum,* VIII (1938), 203ff.

[34] *Raymundiana,* II, 7; ed. Valls-Taberner, "Diplomatari . . ." (note 11 *supra*), p. 253.

[35] *Raymundiana, loc. cit.*

[36] *Loc. cit. supra;* also in his *San Ramón de Penyafort* (Barcelona, 1936), p. 15.

[37] The fact that he is styled *magister,* not *frater,* would not create any difficulty against such an assumption. The same usage is found, e.g., in a case discussed in the *Quaestiones Borghesianae,* cf. *Repertorium,* p. 429.

[38] J. R., "San Raimundo de Peñafort ¿fue canónigo de Barcelona?" *Analecta sacra Tarraconensia,* XX (1947), 251-3.

Be this as it may, the first of April, 1222, as the day of Raymond's entering the Order, remains one of the incontrovertible dates of his career. Since this decisive turn of his life occurred at Barcelona less than four months after he was still busy at Bologna inserting a reference to a recent decretal of Pope Honorius III in his *Summa iuris canonici;* and since only one fragmentary manuscript of this *Summa* has come down to us, after having been forgotten for more than six centuries, it is reasonable to conclude that the future compiler of the Decretals of Gregory IX never found the time to finish his first major treatise on canon law.

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DE IURE NATURAE APUD IURISCONSULTOS ROMANOS

Maximo ingenii acumine, ut solet, Ernestus Levy die decima decembris anni 1948 in Universitate *Notre Dame* (S.F.A.) disseruit de re sat controversa hodiernis temporibus, nostris autem disciplinis iuridicis apprime necessaria, nempe de nexu inter iurisprudentiam classicam et iuris naturae scita.[1] Postquam dilucide Ciceronis opera ad rem facientia—in quibus philosophorum graecorum, Aristotelis nempe, iuris naturalis doctrina et Stoicorum praecepta moralia, iurisconsultis Romanis certo haud ignota, ad mentes Romanas et linguam convenienter aptata inveniuntur—profundiori indagini subiecit, fragmenta in Digestis contenta et Gaii Institutiones solerti animo perlustrat. Cl.mus Levy merito censet Romanam iurisconsultorum indolem de rebus minutis et quotidianis familiariter agentium longe abhorrere a speculativa Graecorum mente. Iurisconsulti Romani saepe saepius utuntur verbis *ius naturale, naturalis ratio, rerum natura,* de iure positivo et privato disserentes, quin theoriam philosophicam propugnare conentur.

Apud Romanos nondum vox *ius positivum* in usu erat ad systema iuridicum diversorum populorum dignoscendum, vel ad discriminandam legem humanam (" nomikon dikaion ") a iure intuitive cognito.[2] Cl.mus Stephanus Kuttner iam diu originem huius denominationis detexit.[3]

[1] E. Levy, " Natural Law in Roman Thought," reimpressum ex *Studia et Documenta Historiae et Iuris,* XV (1949), 23 pp.

[2] *Ibid.,* p. 6.

[3] S. Kuttner, *Revue Historique de Droit,* Ser. 4, XV (1936), 728 ss.

Potius ius naturae adhibetur a iuristis classicis Romanis de iure privato tractantibus, ut indicetur intimum ligamen intercedere inter iuris privati Romanorum structuram et ordinem felicitati civium convenientem.[4] Nulla ergo ulterior inquisitio ipsis est necessaria, quando experientia teste lineamenta iuris civilis vel privati respondebant necessitatibus et evolutioni populi.

Idem sentit Ernestus Levy ac Fritz Schulz in hac materia. Eadem asserta inveniuntur in istius opere noto de iuris Romani principiis.[5]

Si vero iurisconsultorum fragmenta singillatim conspicimus, haec notanda iuvat: grammaticalis contextus fragmentorum prout hodie iacent in compilatione Justiniani, atque pulchra indoles linguae latinae haud semel invicem adversantur; inde cl.mus Levy merito adiungit pluries in singulis fragmentis in quibus voces *natura, ratio, naturalis ratio, ius naturae* occurrunt interpolationem formalem ostendi posse, quin ex hoc capite necessario colligendum sit iurisconsultos Romanos illa supra laudata verba omisisse vel usum recursus ad ius naturae, prout eorum mentibus obversabatur, ignorasse. Cl.mus Levy hodierna indagine concordat cum cl.mo Magistro Riccobono qui per saeculi dimidium haec constanter adseruit, saepe fructus segetis interpolationismi ad externam fragmentorum faciem iure meritoque coarctans atque circumscribens.

De singulis fragmentis cl.mus Levy aequo pondere disserit. Gaius naturali rationi tribuit limitationem capacitatis iuridice agendi in homine impubere, inde etiam institutum tutelae:

> "Sed impuberes quidem in tutela esse omnium civitatium iure contingit; quia id *naturali rationi* conveniens est, ut is, qui perfectae aetatis non sit, alterius tutela regatur, nec fere ulla civitas est, in qua non licet parentibus liberis suis impuberibus testamento tutorem dare. . . ."[6]

Idem Gaius de valore iuridico promissionis a furioso factae: "Furiosum, sive stipuletur, sive promittat, nihil agere *natura* manifestum est."[7] Idem Gaius coniunctionem sanguinis inter familiae

[4] Cfr. Aristoteles, *Ethica ad Nicomachum*, V, 3: 1129b, 14-19 (in editione quae audit The Loeb Classical Library, pp. 258, 259, lin. 13 ss.); F. Wilches, "De fine iuris," *Antonianum*, XIX (1944), 270 ss.

[5] F. Schulz, *Principles of Roman Law* (Oxford, 1936), 34 ss.

[6] Gai. I, 189; de hoc et Gaii locis sequentibus agit Levy, p. 7 ss.

[7] Gai. *Rerum cottidianarum*, D. 44, 7, 1, 12.

membra vocat naturali iure cognationem: [8] " non sunt agnati, sed alias *naturali iure* cognati "; nec capitis deminutione tale vinculum solvitur " quia civilis ratio civilia quidem iura corrumpere potest, *naturalia* vero non potest." [9] Idem Gaius de iniusto agressore: " nam adversus periculum *naturalis ratio* permittit se defendere." Nota est Stoicorum doctrina de naturali cognatione omnium hominum. Inde iurisconsultorum Romanorum fragmenta quae hanc doctrinam praesupponere videntur non sunt adscribenda scholis Byzantinis. Notae etiam sunt stipulationes inutiles, de quibus Gaius.[10] Idem dicendum de modis acquirendi proprietatem naturali iure aut civili.[11] Perspicua est tractatio Gaiana de specificatione in qua naturalis ratio requiritur.[12]

Ut Levy scite arguit, ex his elucet ratio qua iurisconsulti Romani systema iuris privati conspiciunt, id est, tamquam organismum vivum cuius indoles cuiusque limites natura definita sunt. Cl.mus Levy adducit locum Institutionum Gaii in quo refertur disputatio iurisconsultorum qui distinguunt inter furtum manifestum aut lege aut natura:

> " . . . sed verius est (ait Gaius) [13] natura tantum manifestum furtum intellegi; neque enim lex facere potest, ut qui manifestus fur non sit, manifestus sit, non magis quam qui omnino fur non sit, fur sit, et qui adulter aut homicida non sit, adulter vel homicida sit; at illud sane lex facere potest, ut proinde aliquis poena teneatur, atque si furtum vel adulterium vel homicidium admisisset, quamvis nihil eorum admiserit."

Si Romanos iuridica fictione saepe usos esse conspicimus, colligere oportet eos systematis iuridici unitati ita favere voluisse ut nonnisi reluctanter fictionis ope ei vulnus quodammodo infligere patiantur.

Quid cl.Auctor de nota dichotomia aut trichotomia iuris apud iurisconsultos classicos sentiat, inspiciamus. Imprimis inter se confert duo opera quae ad nostram rem faciunt, nempe: Aristotelis Ethicam ad Nicomachum, 1134b, 18 et Institutiones Gaii. Aristote-

[8] Gai. I, 156.

[9] Gai. I, 158.

[10] Gai. III, 97, 97a.

[11] Gai II, 66 s.

[12] Gai. II, 79.

[13] Gai. III, 194.

les ait: " Justitia politica duplex est: naturalis una, altera legalis. Iustitia naturalis eamdem vim habet ubique neque pendet a nostra acceptatione vel reiectione." Gaius, ut omnes norunt, ait: [14] " Quod vero naturalis ratio inter omnes homines constituit, id apud omnes populos peraeque custoditur vocaturque ius gentium, quasi quo iure omnes gentes utuntur." Iurisconsulti Romani tempore imperii certo assuefacti erant notionibus philosophicis moralibus maxime evulgatis ut, verbi gratia, divisioni aristotelicae supra laudatae; immo in iuris commentariis, de mancipatione et traditione disserentes, facili obtutu similitudinem institutorum iuris gentium cum iustitia naturali aristotelico more concepta perspicere poterant: *traditio* eamdem vim ubique habet, *traditio* apud omnes populos peraeque custoditur. Colligi oportet plura instituta iuris gentium reducta esse ad notionem *naturalis rationis* vel e converso *naturalem rationem* derivatam fuisse ex indole institutorum iuris gentium apud iuristas aetatis aureae. Immo unum verbum pro alio interdum promiscue adhibitum fuisse censet Levy. Optime cl. A. monet apud classicos iurisconsultos illam duplicem categoriam aequationem perfectam minime praebere. Ius naturae vel naturalis ratio adhibetur saepe tamquam fundamentum institutorum; e contra ius gentium categoriam necessariam esse constat in technica systematis iuris Romani. Romani ergo, prout convenit, verba *naturalis ratio* quandoque adhibent, quandoque omittunt.

Quibus laudibus efferram Auctorem nostrum nescio, praesertim quod in critica philologica recedere voluerit a postulatis hucusque a pluribus admissis in ratione loquendi a iurisconsultis aetatis aureae adhibita. Levy hodie non dubitat quin asymmetrice usu veniat notio iuris naturalis quando Gaius et alii id genus contraponunt instituta iuris civilis institutis iuris gentium. Haec notio, iuste concludit ipse, non habet locum firmum in systemate iuris classici, attamen valde usurpatur. In servis autem ius naturae apud iuristas classicos sibi vindicat plenam autonomiam, ibi proprias sequelas iuridicas servandas proponit. Ulpianus ait: " Quod attinet ad ius civile, servi pro nullis habentur: non tamen et *iure naturali*, quia, quod ad *ius naturale* attinet, omnes homines aequales sunt." Et alibi: " Manumissio . . . a iure gentium originem sumpsit, utpote cum *iure naturali* omnes liberi nascerentur nec esset nota manumissio, cum servitus esset incognita: sed posteaquam iure

[14] Gai. I, 1.

gentium servitus invasit, secutum est beneficium manumissionis. . . . " Neque silentio praetereundae sunt definitiones libertatis et servitutis a Florentino nobis traditae: " Libertas est naturalis facultas eius quod cuique facere libet, nisi si quid vi aut iure prohibetur. Servitus est constitutio iuris gentium, qua quis dominio alieno contra naturam subicitur." [15]

Optime Levy laudata fragmenta monet interpretanda esse inspecta doctrina Stoicorum valde evulgata inde a Ciceronis tempore et praecognitis practicis difficultatibus, quae saepe occurrebant iuristis antiquam technicam adhibentibus; deerat enim iurisconsultis perspicua categoria in negotiis servorum; servi non poterant haberi ut fructus, quando sermo erat de partu ancillae; naturali ratione si ancilla ex cive Romano conceperit, deinde manumissa peperit, eum qui nascitur liberum Romani putabant teste Gaio. Valde acute arguit Levy cognationem inter servum et filium vel inter servorum descendentes onera afferre quae iuri naturali adscribenda oportebat, v.g. impedimenta ad vitam maritalem vel sexualem, filiorum officia reverentiae erga patres. Inde necessitas distinguendi cognationem servorum ope verbi *naturalis*. Servi stipulatio: possidere mihi licere spondes? non inutilis visa fuit Ulpiano, cum servus possessionis naturalis capax esset. Valde propinqui sunt ergo conceptus cognationis naturalis et possessionis naturalis, necessitate perspecta tuendi servorum vitam socialem. Inde in usu fuerunt apud iurisconsultos classicos.

Quid vero de vexata quaestione circa verba *naturalis obligatio?* Qui litteraturam Romanisticam perpendat per saeculi dimidium, facili negotio sibi persuasum habet interpolationistas ea verba Byzantinis tribuenda censere. Si vero inter se conferuntur verba *naturalis possessio, naturalis cognatio* et *naturalis obligatio,* inspectis servorum necessitatibus in vita sociali, perpensis Institutionibus Gaii quae distinguunt inter naturalem et civilem obligationem, non est cur Tryphonino non assentiamus dicenti: " ut enim libertas naturali iure continetur . . . ita debiti vel non debiti ratio in condictione naturaliter intellegenda est." [16]

Quodsi apud antiquos scripta Senecae valde evulgata fuisse inter omnes constat, cur iuri assuefactis ignota esset sententia illa: [17]

[15] Ulp. D. 50, 17, 32; Ulp. D. 1, 1, 4; Flor. D. 1, 5, 4 pr.

[16] Tryph. D. 12, 6, 64.

[17] Seneca, *De benef.* 3, 20, 1.

" corpora obnoxia sunt et adscripta dominis, *mens quidem sui iuris*"? Si talis erat persuasio communis, ratio practica suadebat ipsis dominis ut obligationes servorum non iure gentium (utpote in oppositione in casu, vi instituti iuris gentium, scilicet servitutis) sed ope iuris naturalis robur haberent.

Si ergo applicationes practicae, non vero nudi conceptus prae oculis habentur in verbis *naturalis cognatio, naturalis obligatio* et *naturalis possessio,* liquet iuris consultos Romanos ea ratione indicare voluisse in triplici casu supra exposito effectus iuridicos quodammodo reduci, minime vero servo negari, sive in officiis ortis ex cognatione, sive in rerum detentione, sive in activitate commerciali. Hic ergo ius naturae supplet defectus iuris positivi; influxus ergo iuris naturae ad extraordinaria adiuncta vitae socialis coarctatur. Iurisconsulti hac de causa ipsi inferiorem vim adscribere solent.

Ultimo loco Levy agit de Institutionibus Ulpianeis. Notum est collectionem Digestorum incipere fragmento ex Institutionibus Ulpiani deprompto.

Iam Hugo (1832) hypothesim proposuit Ulpiani Institutiones conscriptas esse ab aliquo scriptore occidentali in epocha postclassica; quidquid sit de hac hypothesi, Levy difficulter admittit classicitatem propositionis fragmenti quae sonat: " Privatum ius tripertitum est: collectum enim est ex naturalibus praeceptis aut gentium aut civilibus." [18] Immo tractans de notione iuris naturalis quae sequitur (" ius naturale est quod natura omnia animalia docuit "), censet animalia bruta et homines sociales distinctos fuisse a iurisconsultis classicis. Chrysippus, Seneca et Marcus Aurelius dignitatem humanam in viventibus secernunt a brutis animantibus. E contra fragmentum Regularum Ulpiani, quod sonat: " Iuris praecepta sunt haec: honeste vivere, alterum non laedere suum cuique tribuere " [19] genuinum esse cl. A. censet.

De genuinitate fragmenti Institutionum mihi videtur dicendum Stoicos unitatem naturae cosmicae valde extollere, necnon dynamismum mundi ad instar gradualium virium unius animae, id est psychologice descripsisse. Ignoti erant apud illos limites inter scientias naturales et culturales. Inde phaenomena ethnica et

[18] Ulp. 1, 1, 1, 2.

[19] Ulp. D. 1, 1, 10, 1.

sociologica necnon iuridica gradum superiorem obtinere, si vultis, attamen unius eiusdemque animae mundi phaenomena esse Stoicorum mentibus apparent. Metaphysica Stoica construitur super fundamentum psychologiae. Neque silentio praetereundum est metaphysicam Stoicorum esse panenergetismum materialisticum et monisticum.[20]

Concludendo dicamus quod philologica methodus valde profuit ad criticam textualem. Attamen quam facile in errores adducantur philologi critici ostendit dissertatio cl.mi Levy qua hodie invicte propugnatur genuinitas textuum quorum verba et ideae quinquaginta abhinc annis in derisionem et despectum afferebantur tamquam exempla vacuitatis Byzantinismi. Certo nostrum apparet meliorem nactum esse cognitionem iurisprudentiae Romanae.

Felix A. Wilches

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Fas et Jus. Études de Droit Romain par Pierre Noailles. Préface de Gabriel Le Bras. (Collection d'Études Anciennes publiée sous le patronage de l'Association Guillaume Budé.) Paris: Société d'Édition " Les Belles Lettres ", 1948. iv, 284 pp.

Pierre Noailles, the distinguished Romanist of the Paris Faculty of Law, died on November 25, 1943. In the last years of his life, this scholar, formerly active in the field of the Byzantine sources, had joined the swelling ranks of those who in recent years have devoted themselves to the task of penetrating the darkness shrouding the earliest history of Roman institutions. The objective he had set for himself was to demonstrate that the institutions and forms of the *ius civile* should be understood as adaptations to the needs and to the rational ways of thinking of a politically organized society, and thus as further developments of rites rooted in the primitive religious notions of the prehistoric predecessors of the Roman state. He has provided a programmatic synopsis of his ideas in a *cours de doctorat* on the subject of *Du droit sacré au droit civil*.[1] In addition, Noailles was planning to lay down the

[20] L. Stein, *Die Psychologie der Stoa* (Berlin, 1886), 15 et ss.

[1] First published in mimeographed form (1942), meanwhile also published as a printed book. Neither edition is accessible to me. I have not been able to ascertain whether this book is identical with the likewise mimeographed course given by the author in 1938-39 and 1941-42 under the title, *Répétitions écrites de Droit Romain approfondi.*

results of his studies in a series of special investigations. When a premature death brought his work to an abrupt halt, six articles had been published in different places; a fragment of a seventh inquiry was found among his papers. G. Le Bras, who contributed a preface, and A. Dain have assembled these seven studies in the volume under review.

With this, the editors have done more than erected a well-deserved monument to a late friend. We are indebted to them for having provided easiest access to a line of research and a number of new theories which are well worth the close attention of fellow scholars. For Noailles' approach is original, and his method is sound; it combines the courage of conjecture, necessary in this type of research, with a meticulous analysis of the few sources available and with a utilization of results obtained in the fields of sociology, ethnology, and comparative history of religion. In particular, his insistence on interpreting each source as an integrated whole, rather than taking its parts (as is too often done) as bits of unconnected information, should be commended; as an example, his excellent analysis of Varro, *Ling. Lat.* 7.105, in the article on *nexum*, perhaps the best of the whole series, may be cited. Needless to say, some of the author's suggestions have met or will meet with opposition. Sometimes, it seems to me, he has not entirely withstood the temptation of giving too free a rein to his phantasy. Nevertheless I do not doubt that several of his theories represent definite gains, and all of them are interesting and apt to stimulate further research.

The readers of *Seminar* are probably familiar with the second article, "Junon, déesse matrimoniale des Romains" (pp. 29-43), reprinted from *Festschrift Paul Koschaker* (Weimar, 1939), I, pp. 386-400. The author points out that the matrimonial role of the goddess, although not older than the city itself, had absorbed the functions of a host of minor deities who, owing their origin to primitive animistic conceptions, were from very ancient times invoked for the protection of every phase of the establishment of the marital relation. This seems to fit in well with the view, now prevalent among Romanists,[2] that the *conventio in manum* was never more than a mere concomitant, but not the establishment

[2] Chiefly set forth by E. Volterra, *La conception du mariage d'après les juristes romains* (Padua, 1940) 2ff., *Studi in onore di Siro Solazzi* (Naples, 1949) 675ff. See also, most recently, M. Kaser in *Iura* I (1950) 65.

itself, of the marital relation. Not only does Noailles point out that the rites in question had nothing to do with the *confarreatio* (rightly considered by him, on account of its connection with the cult of Jupiter, as a form not antedating the foundation of this cult under the Tarquinii), but these rites in fact did not concern the *manus* at all.

Less well-known may be the first article, "Les Tabous du mariage dans le droit primitif des Romains" (pp. 1-27), first published in the *Annales sociologiques*, sér. C, fasc. 2. The *lex Romuli* concerning the right of divorce, described by Plutarch, *Romul.* 22, was really, according to the author, a very old rule of sacred law aimed at the enforcement of the taboos—against the use of potions for the purpose of effecting an abortion (*φαρμακεία τέκνων*), against the drinking of wine, and against adultery—which were imposed on women. With all the reserve becoming one not competent to judge in matters of religious history, I would call this hypothesis and its justification seductive (Noailles finds the ground for the taboos in old notions of the magic power of blood; wine symbolizes blood). It certainly makes understandable the peculiar prohibition of wine to women, which was still in force as late as the time of Cato the Censor. Less convincing is Noailles' attempt to trace the lines leading from the archaic rule to the law of historical times. Even if we accept his conclusion that the old rule made the repudiation of a wife who was guilty of a violation of the taboos a duty rather than a right of her husband, the rule fits ill with the death penalty inflicted on her in republican times by the *iudicium domesticum;*[3] and it is not possible to connect the alleged forfeiture—half to the wife and half to Demeter (whom the author identifies with Ceres)—of the fortune of a husband guilty of unjust divorce with the *actio rei uxoriae.* Noailles' interpretation has thrown some light on Plutarch's passage, but it has by no means solved all its riddles.

Of greater importance from the standpoint of legal history proper are the five remaining articles. Three of them—"Vindicta"[4] (pp. 45-90), "Manum inicere"[5] (pp. 147-186), and the special inquiry

[3] Dion. Hal. 2.25.6, Cato maior, in Gell. 10.23.4, 5. The author, it is true, considers *θανάτῳ* in Dionysius' passage an interpolation and the *iudex* mentioned in Cato's remark, a trial judge. I strongly doubt either interpretation.

[4] *Revue historique de droit français et étranger* XIX (1940-1941) 1-57.

[5] *Ibid.* XX (1942) 1-34.

into "Le procès de Virginie"[6] (pp. 187-221)—concern the *legis actiones*. "Nexum"[7] (pp. 91-146) and the posthumous article, "L'Auctoritas dans la Loi des XII Tables" (pp. 223-282), lead from the study of procedural forms into that of institutions and concepts of substantive law.

The article on *vindicta* is based on two premises: the etymology of the word (*vim dicere*) and the fact that the *nota iuris* (Val. Prob. 4.6), "S.S.C.S.D.E.T.V. secundum suam causam sicut dixi ecce tibi vindicta," proves, contrary to the punctuation given by editors of the *Institutes*, this phrase to be an organic part of the word ritual of the *legis actio sacramento in rem*, as reported by Gai. 4.16. The analysis of these premises leads the author to reject with H. Lévy-Bruhl,[8] the theory that the *l.a.s.i.r.* was a mere formalization of an original act of violent selfhelp; *vindicta*, far from being synonymous with *festuca*, signifies a "force rituelle" of a religious character, which confirms the *vindicatio* expressed in the solemn phrase: "hunc ego . . . meum esse dico."

To this extent, I believe that Noailles' hypothesis deserves approval.[9] His further conclusions, however, seem to be open to criticism. His characterization of the *vindicta* as a religious force remains somewhat vague, more so, since he refuses—correctly—to find its effectiveness in magic. Likewise vague is his claim that the application by the *vindicans* of this ritual force *creates* his power over the object. The decision as to which of the two conflicting powers, equally well established through the same ritual force applied by both the *vindicans* and the *contra vindicans*, should prevail, Noailles leaves to the deity; that is to say, he shares the certainly correct view of those who interpret the original *sacramentum* as a submission to an ordeal.[10] But one wonders on what

[6] *Revue des études latines*, 1942, pp. 106-138.

[7] *Rev. hist. etc.* XIX, 205-274.

[8] *Quelques problèmes du très ancien Droit Romain* (Paris, 1934) 171-180: "Le simulacre de combat dans le *sacramentum in rem*."

[9] See also P. Koschaker, *Zeitschrift der Savigny-Stiftung*, Rom. Abt. LXIII (1943) 467.

[10] See, most recently, Kaser, *Das altrömische Ius* (Göttingen, 1949) 18f. I cannot agree, however, when Noailles (as did, before him, Lévy-Bruhl, *op. cit.* 109 n. 3; see also *Law Quarterly Review* LX [1944] 52 n. 8) considers the

grounds the deity should decide the issue. The cause of the dilemma lies, I believe, in the author's concept of *ius* which he considers as an abstract, objective notion, conceived only after the state had replaced the former religious rite with its own jurisdiction. The trouble disappears as soon as we realize that *ius*—a concept probably much older than the city—was the rightful and divinely, later legally, protected power of a man determining his relations to other men.[11] Therefore the dialogue, " postulo anne dicas . . . "; " ius feci . . . ," must, contrary to Noailles, originally belong to the ritual of the *l.a.s.i.r.* The *contra vindicans* claims that by imposing the *vindicta* he has manifested his power and submitted it to divine protection.[12] This not only gives its full meaning to the mentioning of the *causa,* convincingly connected by Noailles with the *vindicta,* but it also explains how the sacred rite of imposing the *vindicta,* precisely as defined by Noailles, came to be the device by which a controversy over a *ius* was submitted to divine judgment. The magistrate's function, at its earliest stage, was merely to *insure,* through his " mittite ambo hominem," that the issue joined by way of bilateral selfhelp seizure [13] was decided by the orderly procedure of an ordeal.

The author's aim in " Manum inicere " [14] is to combat the theory, based on Gai. 4.21-25, which holds that the *legis actio per manus iniectionem* took place wholly *in iure,* and which recognizes only

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original *sacramentum* as the sacrifice of an animal, and the *haruspicina* as the means by which the verdict of the deity was ascertained; this theory was set forth by Noailles in *Répét. écr.,* cited—apparently with approval—by V. Arangio-Ruiz in his review of the articles " Vindicta ", " Manum inicere ", and " Le procès de Virginie " in the *Archivio Giuridico* of 1948. Kaser and others have convincingly shown that the ordeal took the form of a duel and that the *sacramentum* was a wager of their own persons put up by the parties for the truthfulness of their claims.

[11] Cf. *Seminar* VII (1949) 91.

[12] Cf. *Seminar cit.* 90.

[13] Noailles' complete denial of a stage at which selfhelp was the only means of pursuing a claim goes too far. Cf. now, as to the role of selfhelp at the earliest stage, Kaser, *Eigentum und Besitz im älteren römischen Recht* (Weimar, 1943) 31, *Ius* 325. I do not, however, agree with Kaser in so far as he believes in a magic effect of the symbolic seizure; cf. *Seminar cit.* 95.

[14] A second article was planned by Noailles, but never written.

the *manus iniectiones iudicati, pro iudicato,* and *purae* named by Gaius. He shows that there were more cases of *m.i.* and that the *l.a.p.m.i.* began as an extrajudicial seizure to be completed *in iure.* These results, which seem fully acceptable,[15] are then applied to the *m.i. vocati* (*XII T.* 1.2), which is likewise considered as a true *legis actio.* This I hold to be correct,[16] but I doubt the author's further conclusion that the function of the *m.i. vocati* was merely to make possible the *ductio in ius* of the defendant for the purpose of obtaining a judgment against him.[17] Noailles, if I understand him correctly, combines the *em capito* in *XII T.* 1.1 and the *manum endo iacito* in the following provision into one act. This, however, runs counter to the fact that the law makes the latter dependent on the additional condition of active resistance offered by the *vocatus.* The *m.i. vocati* must have been, like every *m.i.,* an act of formal selfhelp based on an alleged right of seizure and must have led to the *addictio* of the defendant to the plaintiff, unless a *vindex* appeared *in iure.*[18] In other words, the magistrate, in fulfilling his function of controlling selfhelp, permitted direct action against one who in the presence of witnesses had resisted the summons to appear before his tribunal. This alone, in my opinion, can explain the progressive severity of the steps envisaged in the first sentences of the XII Tables. The author's contention that *XII T.* 1.2 did not open the gates to sheer and brutal force, but provided for a *legis actio,* is not invalidated by this correction.

[15] See also V. A. Georgescu, *Z. Sav. St.* LXIV (1944) 380f., Kaser, *Ius* 120.

[16] I agree, however, with Kaser's (*Ius* 192 n. 5) objection to Noailles' attempt to attribute a religious character, similar to that of the *vindicta,* to the *l.a.p.m.i.* (for whatever purpose). Kaser says rightly that "diese rituelle Gewalt ist nichts anderes als die Betätigung der Selbsthilfe." It was selfhelp applied in a legalized, and therefore unassailable, manner; cf. Kaser, 193, also Koschaker, *op. cit.* 466f. The author's theory loses its foundation as soon as we recognize that the religious force of the *vindicta,* too, was not of a constitutive character but rather consisted in the fact that the solemnly declared *vis* would be protected by the deity, if based on an existing *ius.*

[17] Against this conclusion cf. Kaser, *op. cit.* 182 n. 23, who rightly emphasizes that the acquisition of a power, but not the judgment, needed acknowledgment by the magistrate. As to the legal import of *addictio,* see, most recently, Kaser, 107f.; Wolff, *Seminar* VII, 94.

[18] The mechanism of the procedure has been fully analyzed by Kaser, *Ius* 191ff.

Though published later, results obtained in the paper just discussed served Noailles as a basis for his essay on the *nexum*. This is his main thesis, at which he arrives from an exegesis of Varro, *Ling. Lat.* 7.105: The *nexum*-bond was established by means of a transaction *per aes et libram*, the *nuncupatio* containing, *inter al.*, the declaration: " isque mihi nexus esto hoc aere aeneaque libra "; it gave the creditor, during a period specified in the *nuncupatio*, a right to require the services of his debtor (who remained, however, a free citizen) and, if the *aes nexum* was not refunded when due, a right to proceed with a *manus iniectio*. Save for some minor objections to the author's conjectures concerning the terminology of his source and the exact contents of the *nuncupatio*,[19] the theory is, in my opinion, acceptable and should lay to rest the long controversy on the nature of the *nexum*.[20] If coupled with Kaser's [21] elucidation of the phrase *ita ius esto*—to be understood as allowing direct seizure without the necessity of securing a *iudicatum*—it provides a satisfactory sense for *XII T.* 6.1: " cum nexum faciet mancipiumque, uti lingua nuncupassit, ita ius esto."

The last and longest article in the series is the hitherto unpublished study on *auctoritas*. The manuscript is incomplete, but the editors were able to supply part of the missing discussion through the inclusion of a chapter on *aeterna auctoritas*, taken from *Répétitions écrites de Droit Romain approfondi*. After a somewhat lengthy review of the literature since Budaeus, the author defines *auctoritas* as a quality of the *auctor*, a " pouvoir de soutien," [22] or power to confirm an act accomplished or a right acquired by another. This definition is said to cover all the cases of *auctoritas*,

[19] The objections were pointed out by Koschaker, *op. cit.* 459f. As to the author's explanation of the expression *aes alienum* (which he derives from Varro's *neque suum fit*, considered by him as a quotation from the *nuncupatio*) see also Kaser, *Ius* 287.

[20] Other recent statements are in substantial agreement: Koschaker, *op. cit.* 465, K. F. Thormann, *Der doppelte Ursprung der mancipatio* (Munich, 1943) 198ff. (quoted from Kaser's review in *Deutsche Literaturzeitung*, 1944, p. 83ff.), Georgescu, *op. cit.* 386, Kaser, *Ius* 234ff. Differently Lévy-Bruhl in his article on the act *per aes et libram* (known to me only from F. de Zulueta's translation in *Law Quart. Rev.* LX [1944] 51-62).

[21] *Ius* 119, also 103.

[22] The author has taken over this expression from F. Senn, *Rev. hist. etc.* XV (1936) 401.

i.e., the *a. patrum* and *tutoris,* as well as the *a.* of the *mancipio dans.*

It is interesting to note that the interpretation given by Noailles to the *usus auctoritas* rule (*XII T.* 6.3) is not far distant from that which was, simultaneously and independently, suggested by Kaser.[23] On the other hand, it seems to me, here as in other articles, that the inferences drawn by the author from correct premises are not always tenable. Thus it is contrary to established theory and certainly incorrect (as well as unnecessary from the standpoint of the author's own theory) when he defines the function of the *auctor* in the defense against eviction as that of a mere witness. These brief remarks must suffice. A critical review of the whole article, which is in many respects highly stimulating, would require a detailed investigation that cannot be undertaken here.

The reviewer regrets that within the limited space of a book review he cannot discuss the numerous interesting details which fill the theories set forth by the author with real life. For the same reason it was impossible to deal at all with Noailles' analysis of the case of Verginia.

The book comprises the legacy left to our science by a fine scholar and original thinker. It will exert its due influence on further research.

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Collectio bibliographica operum ad ius Romanum pertinentium. By L. Caes and R. Henrion. *Series I: Opera edita in periodicis miscellaneis encyclopaediisque,* vol. I, and *Series II: Theses,* vol. I: *Theses Gallicae.* Brussels: Office International de Librairie, 1949, 1950. Pp. 447, 447 respectively.

Without belittling the value of existing bibliographies of Roman law, it can be stated that they will all be superseded by the work under review, if and when it is completed. The authors, professors of Roman law at the Universities of Louvain and Liége respectively, are aiming at no less than a complete collection of titles on questions of Roman law (down to Justinian, but omitting medieval and modern developments) and of Byzantine law, published in the

[23] Cf. Kaser, *Eig. u. Bes.* 86ff., *Ius* 178.

last century and a half in the Dutch, English, French, German, Greek, Italian, Latin, Portuguese, Roumanian, and Spanish languages. The whole is divided into three series; the titles of the first two series appear from the heading of this review, and the third is entitled: *Opera praeter theses separatim vel etiam coniunctim edita.* Each series will consist of several volumes, each volume comprising about 5,000 titles. Of the two volumes so far issued, vol. I, 1 exploits the principal French and Italian journals and encyclopedias (Daremberg-Saglio, *Dizionario epigrafico, Nuovo Digesto Italiano*), as well as the *Tijdschrift voor Rechtsgeschiedenis* (unfortunately, but understandably, book reviews have been omitted), while vol. II, 1 lists all Romanist doctoral theses submitted to French universities and published as printed books. Volumes 2 and 3 of series I, dealing with German publications, are in preparation.

The method of the authors is simple but effective. Each volume contains an alphabetical conspectus of writers with works listed under each name in chronological order; this is followed by a detailed subject index, referring back to the *index auctorum.*

Needless to say, this work should be in every Romanist library. The reviewer can do no more than express the hope for a speedy and successful completion of the admirable enterprise.

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Giorgio Balladore Pallieri [and] Giulio Vismara, *Acta Pontificia Juris Gentium usque ad Annum MCCCIV.* (Biblioteca dell'Unione Cattolica per le Scienze Sociali, volume 12.) Milan, Società " Vita e Pensiero ", 1946. Pp. xl, 656.

The authors have undertaken the difficult task to collect papal documents that have a bearing on international law and show the share of the popes in its development. The present volume reaches from the beginnings of the Church to the year 1304. Is it possible to speak of " international law " during this period, and especially in the feudal Middle Ages, from which most of the published documents date? The prevailing opinion is that international law, in the modern sense, came into existence only with the " sovereign state," i.e., not before the sixteenth century. This question is dis-

cussed by Professor Balladore-Pallieri in his introduction to the collection of pontifical documents. He does not deem it important to enquire whether absolutely independent entities might have existed under the feudal system. Certain parts of the relations of feudal entities with others, or certain parts of their relations with certain other entities, but not with the others, were established in terms of full parity and of *reciprocal* independence. These relations were dominated by a juridical order which was in no way contingent on the power of the individual, interrelated units. The author, however, concedes that the concept of a *separate body* of international law was absent during the Middle Ages. The function of the papacy with regard to the general law of the Christian peoples was not that of a legislator, but of a guardian of principles, such as the popes confirmed and defined in every kind of social relations.

The importance for international law of the acts and documents of the medieval pontiffs is easily seen whenever such *acta* touched on the relations between two, or more, relatively autonomous communities. It is not essential, in the opinion of this reviewer, that an " international " character be attributed to these relations. The medieval Christian world lived under a universal law rather than under an international law. As the second of the co-authors, Giulio Vismara, remarks in his introductory words to the book, the nature of the applied norm has no importance in this case. Principles of canon and civil law, in whose formation the popes took an outstanding share, have entered modern international law and have widely contributed to form its contents.

The 2803 excerpts chosen from the pontifical registers and classified according to various topics of international law give a lively picture of medieval inter-community relations and of the exercise by the popes of authority over them. Some of the collected acts deal with problems of specifically medieval nature, in particular such as concern the relation between papal and imperial power, or the common action of Christianity against the infidels. Others refer to problems which are as modern to-day as they were when the respective pontifical decisions, confirmations, or admonitions were written. The principle, " pacta sunt servanda " is corroborated by numerous texts, e.g., when Pope Alexander III admonishes the Emperor Frederick I " ut quae promiserit compleat pacemque

observet" (p. 121). Humanization of warfare is the purpose of papal interventions in favor of exchange of prisoners between belligerent parties (p. 450). Alexander III also prohibited delivery of arms, iron, and wood for galleys to the Saracens, and forbade every Christian to render personal services on the Saracens' ships (p. 263). The Venetians seem to have indulged in "business as usual" rather than comply with the requirements of economic warfare, as ordered by the supreme authority of Christendom. This entailed further papal exhortations addressed to the authorities of that Adriatic Republic.

It is to be hoped that the useful and rewarding collection of *Acta Pontificia Juris Gentium* will be continued for the period after the year 1304.

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The Jews in Medieval Germany. A Study of Their Legal and Social Status. By Guido Kisch. Chicago University Press, 1949. xv, 655 pp. $10.00.

Jewry Law in Medieval Germany. Laws and Court Decisions Concerning Jews. By Guido Kisch. (American Academy for Jewish Research, Texts and Studies, vol. 3.) New York, 1949. xiv, 274 pp. $5.00.

Since 1933, under the influence of the Hitler episode, German and Jewish history and life are often considered basically hostile to each other. Even so-called scholars, on both sides of the fence, do everything possible to make the gap eternal. Kisch's book, which at all times would have been received by all experts with greatest joy, today deserves the closest attention of all lawyers, historians, and even political scientists.

Kisch is today one of the very few scholars who have the full mastery of both German and Jewish history which is indispensable for a book on the structure of German-Jewish relations in the early and late Middle Ages. By 1933 the full emancipation of the German Jews was so far developed that there was a good number of Jewish experts on the German Middle Ages (as e.g., Wilhelm Levison), but almost none of them had any knowledge of Hebrew and of Jewish history. Guido Kisch might be the only one who com-

bines the knowledge of both the German and the Jewish material. In the latter field, much of his learning was imparted to him by his father, Alexander Kisch, an outstanding Rabbi in Prague, who in turn had received his knowledge from a long family tradition in Jewish Religion and Law. On the other hand, Guido Kisch became an adherent of the Germanistic School of legal thought, as developed by Karl Friedrich Eichhorn (1781-1854) and Otto von Gierke (1841-1921); he held chairs as a professor of the History of German Law in Leipzig, Königsberg, Prague, and (from 1922 to his emigration) in Halle. He thus had a unique calling for selecting the Legal History of the Jews in Germany as his topic.

The wave of racial hate going over Germany around 1930 did not influence Kisch's thinking. His whole work is based on Gierke's ideal of historical studies. Almost as a prologue of *The Jews in Medieval Germany,* Kisch quotes Gierke's statement (p. 26): [1]

> Legal History dare not defer to our own ways of thinking by giving up the difficult task of coming as close as possible to the actual manner of development, in favor of a more attractive delineation of a number of static situations. It all depends solely on the ability to operate with the ideas of an age, the thought processes of which were different from ours, in order to understand that age. Hence, as soon as the genesis and nature of old concepts are involved, we must try to put aside, so to speak, our own more finished concepts.

Kisch succeeds in his endeavors. A certain dislike of his for Canon and Roman Law has its basis much more in his Germanistic legal background than in any religious prejudice.

It is not the plan of Kisch to present a new general history of the Jews in Middle-Age Germany, or a substitute for Otto Strobbe's "monumental and classical work" (p. 13), *Die Juden in Deutschland während des Mittelalters in politischer, sozialer und rechtlicher Bezieung* (1866). The plan of the writer is rather to present "special problems or individual groups of problems" (p. 14) of the legal history of Jews in medieval Germany. Actually, the book gives much more: it sheds new light on the society of the Middle Ages; it opens new roads for a study of German legal history.

A full realization of the Christian character of medieval Law leads Kisch to a broad approach in studying the social and legal

[1] In the present review, page references without further specification refer to *The Jews in Medieval Germany;* page references preceded by the symbol *JL,* to *Jewry Law in Medieval Germany.*

institutions of this time. "During the Middle Ages law was considered a part of the Divine World Order" (p. 139).

> Eike von Repkow [1180-1233, the author of the *Sachsenspiegel,* a statement or digest of Saxon, especially Eastphalian, law, cf. p. 341] thus counts the temporal law established by the King as part of the law which has its origin in God. The state adopts religious aims for its own. Hence, Eike's state is a Christian State, a universal state of a secular-ecclesiastical nature. As can be seen, his general theory of law grows from the soil of medieval Christian ethics. With his demand for protection of the Christian world order, Eike was also on religious ground (p. 84).

What is the attitude of this medieval Christian world order to the Jews?

(1) Who was a Jew? "According to the medieval conception of law, Jews were those professing the Jewish faith" (p. 85). Any "alien law theory" applicable to Jews was completely foreign to the early Middle Ages (pp. 52 and 77). There was no national element in the attitude of this time to the Jews (comp. also p. 337f.).

(2) Christian doctrine with regard to Jews. In contrast to Kisch's careful studies in problems of German legal history, his Canonist and (Christian) theological materials are less satisfactory. While he is very friendly to German expression of Christian thoughts, he sees a destructive spirit in "Theology," Canon and Roman law. This is his fundamental statement on the Christian doctrines:

> According to Christian doctrine, the Jewish people were condemned to *eternal servitude* as just punishment for their rejection and crucification of the Savior. But, in accordance with God's precept, they should not be killed; instead, they should be preserved, like Cain, in a life that is worse than death. A remnant of them should be scattered over the world and, through their scriptures as well as through their bodily existence, serve as an external witness (*testimonium veritatis*) for Christendom to the fact that the prophecies concerning Christ had by no means been fictitious. Finally, the conversion of the Jews might be a prelude to the Last Judgment (p. 147).

Certainly, this statement is basically correct, but it is presented in an over-simplified form. The sources he adduces (p. 147 and footnote), largely second-hand, are insufficient in view of the tremendous importance which Kisch gives to these sentences.

(3) Conclusions from this doctrine in the early Middle Ages. When Eike wrote his *Sachsenspiegel* (around 1222) "the condemnation" of the Jews to "eternal servitude" was understood as a judgment to be executed in another world, unless the individual Jew in his lifetime finds his way to Christ. In this world he was only kept separated as far as necessary to prevent direct danger to the Christian Faith: hence, the prohibitions of "intermarriage between Jews and Christians", "employment of Christians by Jews" and of "Jews and Christians taking meals together" (p. 336).

The Jewry Law determines the *relations of Jews to the non-Jewish world.* "It includes laws enacted for the Jews collectively as a separate social group, by means of which laws their legal status in general was determined" (p. 7). It is "to be strictly differentiated from and not to be confused with the designation 'Jewish Law,' comprising the legal material of a religious character based on the Bible, the Talmud, and later Rabbinical ordinances and decisions regulating the *internal life of the Jewish community*" (p. 7).

As mentioned already, "Jewry Law" in the early Middle Ages contained only a few special rules. Kisch believes that "in so far as no special provisions were made for Jews, they were judged according to the law of one of the German national tribes" (p. 87).

Therefore, before the middle of the thirteenth century, Jews could be witnesses or pass judgments (p. 89). They were "under the obligation of *Gerichtsfolge,* which meant pursuing and capturing fugitive peace-breakers (*Gerüftsfolge*) and besieging a castle which had violated the peace (*Belagerungspflicht*)" (p. 89). They could bear arms (p. 113) and join the armies in defense of the country (p. 116).

(4) Lack of interference in Jewish life. While the general law took the initiative to regulate the relations between Jews and non-Jews, no interference in the Jewish sphere took place. The Jewish courts used this sphere fully. A Jewish "Synod" at Troyes, about 1150, "decreed under the penalty of excommunication (*herem*) that no man or woman, related or unrelated, may bring a fellow Jew before Gentile courts" (p. 172). In fact, "not a single instance" of such a happening is known (p. 173). There were even cases in

which Christians had to sue before Jewish courts or in which they "could even be made to stand trial" there (p. 243).

The idea of the purpose of law which dominated the Christian Middle Ages was not so far from the idea which, at the same time, dominated Jewish thoughts. "Jewish law is deeply rooted in religion and based on religious institutions. The laws of ethics are regarded as part of the Jewish system of law. Moral life was religious life. Jewish law thus remained the guiding rule of Jewish life in the Diaspora" (p. 6).

Modern experiences—to mention only the expulsions of Jews, Germans, Hindus, Moslem Indians, Armenians—let it appear almost a fairy tale that once in a fully Christian order a community could live at this level of freedom, while unanimously considered under condemnation to suffer eternal servitude. The fully homogeneous society did not fear the minority. Everyone hoped for the day of final conversion of the Jews. This order did not exist forever.

Kisch proves his thesis in a masterly way. He is excellent in the use of the law books, *Sachsenspiegel,* etc. (p. 34ff.), of which certainly one could not find a more careful analyst. He is, moreover, going entirely new ways by using the decisions of the courts, especially the Magdeburg Jury Courts (p. 171f.). In the second of the two books under review (*Jewry Law in Medieval Germany*), he presents a complete reprint of the pertinent chapters of the law books and a most interesting collection of Jury-Court decisions, selected and critically edited from the manuscript sources. The reviewer shares Kisch's sorrow when he reads that, from 1915 until the end of 1934, Kisch "endeavored to bring together for a legal-historical analysis and systematic survey *all* collections of Magdeburg jury-court decisions still in existence" (*JL,* p. 66). The work was near its completion when the Nazis confiscated the material. Kisch was able to save only his collection of cases relating to Jews.

These cases have not only legal interest. However, in the legal field their significance cannot be exaggerated. For the last one hundred and fifty years Germany has been dominated by a legal method of deductive character. Lawyers are not taught how to find justice in specific factual situations confronting them; they are merely interpreting "rules," and they are told that German tradition requires so. By contrast, the study of the medieval Magdeburg court decisions printed in Kisch's *Jewry Law* will contribute

to a vindication of the case law. Neither in their basic form nor in their method do these cases present us with any problems different from the English cases of the same period. Also, one must remember that the writer of a medieval Law Book of the "Spiegel" type did not codify. He reported the tradition in the shortest possible form, to invite the judges in later cases to follow him. Kisch's edition thus becomes an extremely valuable "casebook." A technical examination of the reported cases would be of great interest, but exceeds the scope of a book review.

The wonderful coordination of men in a Christian world operated fully only as long as the order stood uncontested. The first need of defense against a challenge from the outside—the Crusades—proved to be the first serious shock to the legal order of relations between society and Jews. In many places, persecutions of the most severe kind took place. The Jews consequently needed imperial protection. "From 1103 on," Kisch writes in *The Jews in Medieval Germany*, "the legal protection of the Jews became the subject of imperial land-peace legislation and later also of territorial land-peace legislation" (p. 131). But no one receives a protective position for a long period of time without losing in social reputation. Kisch stresses the principle of the *Sachsenspiegel* (III, 2): "Those who are included in the King's daily peace shall bear no arms" (p. 119). "An explicit prohibition of the Jews from bearing arms in medieval German law occurs, to the present writer's [Kisch's] knowledge, for the first time in the Sachsenspiegel III, 2" (p. 120). These dishonorable conditions encouraged another interpretation of the theological idea of the "eternal servitude" of the Jews. In 1237—a late date in medieval development—the "privilege" of Frederick II for the first time in German history used the term "servitus iudeorum" to justify legal discrimination against the Jews (comp. p. 150f.). Under this concept the Jews in Germany became separated, locally and legally. Step by step the full order disintegrated.

As already indicated, Kisch's studies of the reasons and causes of this disintegration is not quite at the same level as his study of the early Middle Ages. He is too much guided by the anti-Romanistic and anti-Canonistic background of the Gierke school. Throughout the book (e.g., pp. 40, 355ff.) the thesis can be found that a Church-favored reception of Roman Law brought "anti-

Jewish laws" (p. 357) into the German system. "The conception of the immediate validity and applicability of Justinian's Corpus Juris Civilis on German soil naturally included its anti-Jewish laws" (p. 357). Kisch blames the Church and the Canon law for favoring this type of laws. On p. 359, however, he stresses the understanding attitude of the jurists of the School of Bologna, which in fact determined the substance of Canon law more than any other period. One would like to know what Kisch has to say about the theory of Paul Koschaker (*Europa und das Römische Recht*, Munich, 1947), that Roman law was brought to Germany by the emperors as a device to prove their superiority over the Church, since the German emperors, being direct successors of the Roman emperors and applying their law, appeared to be heirs of an older and superior tradition than that of the Church. Finally, does Kisch not exaggerate the anti-Jewish character of Roman Law? There is an urgent need for a scholar of Roman law, having a sufficient knowledge of Jewish law and lore, to write a book parallel to Kisch's "Germanistic" work, which in regard to Canon and Roman law relies on secondary (and often doubtful) sources.

I am inclined to believe that Kisch overestimates the significance of legal rules in society and history. Only in an *obiter dictum*, p. 359, does he refer to "extra-legal sentiments of an anti-Jewish character" as a possible source of the development. Certainly very many problems could and should have been discussed here, e.g.:

(1) To what extent was the thirteenth century already determined by the beginnings of nationalistic sentiments?

(2) To what extent was the Church in a defensive position against the emperor and the territorial powers, with which the Jews came into a tragic alliance (with or without their own desires)? Compare, e.g., the conflict between guilds and Jews on the same ground.

(3) To what extent did philosophical doubts develop in the later Middle Ages, against which the Church had to protect itself? Is there not reason to assume that a minority such as the Jews can live much better in a fully harmonious society than in a society which shows signs of a beginning decay? Would it not be necessary to examine the Jewish participation in these discussions?

(4) Is not a feeling of desperation and impatience understandable in view of the fact that the Jews, refusing to listen to the message of the Church, were increasingly developing an ideological world for themselves? Should we not think through both positions instead of accepting somewhat the modern black-and-white mentality? Already in St. Augustine's sermon to the Jews, the reader becomes aware of an underlying mood of hopelessness as to the conversion of the Jews. How much more justification of this feeling can be found in the thirteenth century?

(5) Is Kisch not again too legalistic if he does not discuss (except for a very few incidental remarks, e.g., p. 196f.) the relations between economic problems and the Jewish development (e.g., guilds and Jews)?

Many more questions should be studied before Kisch's conclusions in this point can be accepted.

In a book review only a few details of " Specific Jewry Law and Its Application " (Part III of *JL*, p. 171-307) can be discussed. The reader finds there problems of Penal Law (p. 179-205), civil law (p. 208-285) and administrative law, especially taxation (p. 288-307). Of special interest seems to be: Usury, the Jews' trade privilege in regard to law of pledges, and " Blasphemy, Conversion, Apostasy." Only the first two will be briefly discussed here.

Usury: On p. 178 of *The Jewry Law*, Kisch brings an especially interesting case decided between 1400 and 1433 by the Naumburg Court. The question in issue was whether Jews can demand interest for money lent. The court points out: " Uff gesuch und wucher geburd uns keyn recht zcu sprechene." Other court decisions show the same tendency. On p. 191ff., especially 196, of *The Jews in Medieval Germany*, we learn that the secular courts " avoided conflict with both secular and Canon law, neither exempting Jews from a prohibition to which Christians were subject nor, on the other hand, discriminating against them in any way." Whether Jews could take interest was up to the ecclesiastical courts (p. 196). The whole special status of Jews in this regard does not appear in the *Sachsenspiegel* (p. 194), but it comes up in the much younger *Meissener Rechtsbuch* (1357-1387) (comp. pp. 42, 195). The use of this case material brings us much farther than the mere

study, be it ever so careful, of ecclesiastical legislation and canonical doctrines on usury. But would it not also have been interesting to give this problem of usury more weight in dealing with deterioration of the Jewish legal status?

Trade Privilege: Kisch's footnotes (p. 473) to this problem are excellent and invite the reader to go deeper. The case book too contains especially interesting cases on this point.

> In the absence of public credit institutions, the Jews were considered and recognized as, so to speak, substitutes for these. They were often expressly compelled by the authorities to lend their money against adequate security in the form of pledges (p. 218).

In regard to the establishment of this pledge the general rules reported by the Sachsenspiegel applied to Jews.

> They were accorded a special position only in one single respect. Under certain conditions and legal precautions they could acquire property or security rights even in stolen goods, whereas non-Jews in such cases were bound by law to restore them unconditionally to their original owner, if he claimed his lawful possession. Jews, in such instances, were entitled to claim compensation to the extent of the price they had paid for the object now reclaimed by its legitimate owner (p. 212).

This trade privilege was bestowed on the Jews in 1090. Kisch shows that the Jew could exercise this privilege only if "the purchase is made 'in the light of day and not behind locked house doors'" (p. 213). The Jew was bound to establish the requirements of his claim by oath. Toward the end of the Middle Ages the privilege disappeared. Kisch's discussion of the historical and legal details of this problem is most excellent.

In conclusion, the reviewer wishes to stress that none of the criticisms offered here can change anything in his general admiration expressed at the beginning of this review. For many years to come, new research on the law of the German Middle Ages will have to take Kisch's work into special consideration: it is a masterpiece.

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THE RICCOBONO SEMINAR OF ROMAN LAW IN AMERICA

At the meeting of October 27, 1950, the members listened to the presentation of a paper on *Roman Law and Jus naturale* sent by Dr. Agustín Diaz Bialet, Professor of Roman Law in the University of Cordoba, Argentine. In the absence of the author, the paper was read by Dr. Franklin F. Russell. The editors of SEMINAR regret that for technical reasons it is not possible to print Professor Diaz's study in full. The following is a summary, kindly prepared by Dr. William H. Roberts, *Scriba.*

The interpretation of legal history is to be based on a hypothesis called "The Law of Identical Facts." The method used against the background of this hypothesis will seek to establish the correct (real) meaning of terms and will be called "Juridical Etymology." The paper is primarily intended to introduce the reader to the "Law of Identical Facts"; the topic "Roman Law and Jus Naturale" is chosen as a vehicle for the presentation of the hypothesis.

The "Law of Identical Facts" distinguishes between absolute and relative identical facts, the former re-occurring in identical fashion irrespective of time, place and level of civilization, the latter being influenced by these factors. "Legal history"—and the paper—is only concerned with absolute identical facts; relative identical facts and their normative regulation by society are the subject matter of "legal archaeology."

Absolute identical facts, because of their very unchangeability and universality, can be traced back to the nature of man; they are "by necessity" identical. To deal with these facts society makes use of "juridical norms." The juridical norms dealing with—absolute and relative—identical facts will be brought into a system, "the juridical order." The nature of the juridical order will be determined by the nature of the juridical norms used to deal with absolute identical facts. The validity of the juridical order will depend on (1) whether the essence of the absolute identical facts has been clearly recognized, and (2) whether the juridical norms and the juridical order based on them conform to the order of things to which the absolute identical facts can be traced (*supra*).

Based on these considerations, the notions of "fas" and "jus gentium" are analyzed. The paper presents as the result of this "etymological" analysis the conclusion that "fas" is an expression of the natural inclination of man (1) to relate the existence of an order of things to God (religious aspect) and (2) to act in conformity with that order (moral aspect). The rules of classical Roman law (*jus civile* and *jus gentium*) pertaining to absolute identical facts recognized these relations irrespective of the various terms used to express them. Etymological analysis—the paper holds—leads to the conclusion that *fas, naturalis ratio, recta ratio, lex naturalis,* and *jus gentium* (if properly understood) are basically identical. All of them refer to the order of things, its reality, unchangeability and universality. "The rule of law that is rationally related to God because it rests on nature, is of *fas*"—these words sum up the particular point which the paper wanted to establish.

ACADEMIC YEAR 1949-1950

Concilium:

Roscoe J. C. Dorsey, LL.M., D.C.L., former Professor at the Washington College of Law, *Magister.*

William H. Roberts, J.U.D., Asst. Professor of Politics, The Catholic University of America, *Scriba.*

Brendan F. Brown, D.Phil. (Oxon), LL.M., J.U.D., Dean, School of Law, The Catholic University of America, *ex officio.*

Rev. Romaeus A. O'Brien, O.Carm., J.C.D., Lecturer in Roman Law, The Catholic University of America, *ex officio.*

Eberhard F. Bruck, J.U.D., Research Professor of Roman Law, Harvard University.

Stephan Kuttner, J.U.D., Professor of the History of Canon Law, The Catholic University of America.

In compliance with a desire frequently expressed by the Washington members of the Riccobono Seminar, the Council adopted a new annual program according to which four of the monthly meetings are henceforth to be held in the form of a general discussion, or "participating seminar," on select readings sent out in advance to the local membership. In these meetings, the following selections were discussed under the joint leadership of Dr. William H. Roberts and Karl K. Spriggs, Esq.:

February 17, 1950: Chapter IX, "Authority," from *Principles of Roman Law* (Oxford, 1936), by F. Schulz.

March 24, 1950: Chapter III, "Property," from *Roman Law and Common Law* (Cambridge, 1936), by W. W. Buckland and A. T. McNair.

April 13, 1950: Chapters XIV-XVI, "Contracts," from *The Principles of Roman Law* (Rochester, N. Y., 1938), by W. L. Burdick.

At the remaining meetings, the following formal papers were read:

October 28, 1949: Dr. Charles S. Lobingier, formerly legal adviser to the U. S. Military Government: "Codification in Korea."

December 16, 1949: Dr. Helmut Coing, Professor at the University of Frankfurt am Main, and Visiting Professor, University of Chicago: "A Typical Development in the Roman Law of Sales."

January 16, 1950: Dr. Edgar Bodenheimer, Professor at the University of Utah Law School: "The Value of Roman Law to the American Law Student."

May 18, 1950: Dr. Roscoe J. C. Dorsey (Magisterial Address): "Wrongs, Delicts, Torts: A Historical and Comparative Study."

Concilium elected for the Academic Year 1950-1951:

Adolf Berger, J.U.D., Professor at the École libre des Hautes Études, New York, *Magister.*

William H. Roberts, *Scriba.*

Brendan F. Brown, *ex officio.*

Rev. Felix A. Wilches, O.F.M., J.U.D., Lecturer in Roman Law, The Catholic University of America, *ex officio.*

Roscoe J. C. Dorsey.

Stephan Kuttner.